ARTICLES

The Powell-Stevens Debates on Federalism and Separation of Powers*

by LESLIE BENDER**

Introduction

According to a well-known saying, a camel is a horse designed by a committee. United States Supreme Court decisions construing the federal Constitution may be characterized as that camel. American constitutional law, like the Constitution itself, emerges from the interplay of many different justices' legal and political philosophies and is the product of compromise and debate rather than of a single plan or philosophy. The Supreme Court represents a committee trying to improvise a contemporary *equus* from horse plans drafted by a different committee centuries ago.

Committees, and groups in general, are more than the sum of the individuals that comprise them and more than the reflections of their leaders or spokespersons. Much of their character develops from the relationships between group members. Examination of these relationships may yield more insight into the group's behavior and direction than studies of individual members. Therefore, studying the interaction between Supreme Court justices will help explain how plans for a horse resulted in a peculiar looking camel.

Traditional analysis of the interaction of Supreme Court members often focuses on the contest between the leaders of liberal and conservative factions. Yet resting conclusions about the internal dynamics of the

---

** Visiting Associate Professor, Syracuse University College of Law; J.D., University of Pittsburgh School of Law, 1979; LL.M., Harvard Law School, 1985.

I dedicate this work to my former boss and respected friend, Sam R. Harshbarger, who permitted me to serve for four years as his law clerk on the West Virginia Supreme Court of Appeals. For helping me to complete this work, I thank Peter Sandwall; my children, Benjamin Saller Bender and Rachael Saller Bender; and my research assistants, Kevin Jennings, Joe Meek, Patricia Shaw, and Timothy McFarland.

Court solely on the positions of Justices Brennan or Marshall vis-à-vis Chief Justices Burger or Rehnquist is too facile. A limited examination of judicial interaction between justices who fall into clearly opposing ideological camps yields only a shallow understanding of the impact of the Court's "centrists" or "moderates." The Court consists of nine justices, each with an equal opportunity to affect the direction of Supreme Court jurisprudence and to influence his or her colleagues' decisions in each case. The moderates, whose votes are available to those ideologues who are willing to compromise, may perform the most subtle maneuvering on the Court. Alternatively, the justices who have been labelled as flexible moderates may instead have rigid legal and political views. Examining their relationships will reveal much about the evolution of American constitutional law. Starting from this premise, this study focuses on the volatile relationship between two of the Court's purported centrists, Justices Powell and Stevens.

During the eleven and a half years they served together on the Supreme Court, Justices Lewis F. Powell and John Paul Stevens,[1] both centrists by reputation,[2] engaged in vehement debate over issues of sepa-

1. Justice Powell was appointed to the Supreme Court in 1971 by President Nixon and resigned on June 26, 1987. After graduating first in his class from the Washington and Lee College of Law, Justice Powell joined a prestigious Richmond, Virginia law firm, eventually becoming a named partner. Neuborne, *Lewis F. Powell, Jr.*, in 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 63 (1978) [hereinafter THE JUSTICES]. In his private practice Powell represented predominantly corporate and wealthy clients. *Id.* at 72; Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445, 446 (1972). He also served as president of the American Bar Association and chairman of the Richmond School Board for 10 years.

Justice Stevens was appointed to the Supreme Court from the Seventh Circuit Court of Appeals in 1975. He studied law at Northwestern University Law School, where he was an outstanding student. Orland, *John Paul Stevens*, in 5 THE JUSTICES at 149; CURRENT BIOGRAPHY YEARBOOK 1976, at 390. Stevens served as a law clerk to Supreme Court Justice Rutledge during the 1947 term and then returned to Chicago to work as an associate in a prestigious law firm. Orland, *supra*, at 150. Stevens' interest in antitrust law led him to his role as Associate Counsel to the House Antitrust Subcommittee and to adjunct teaching positions at the Northwestern and University of Chicago law schools. *Id.* In 1970, Stevens was appointed to a seat on the Seventh Circuit Court of Appeals. *Id.* at 149.

2. In reality, Justices Powell and Stevens should not be viewed as "centrists." Their voting records reveal patterns that may have been obscured by popular media accounts. Data for the following analysis of voting patterns was collected from the annual Harvard Law Review Supreme Court statistical surveys. Copies of the author's compilations of voting patterns are available from the author upon request.

To understand the political alliances of Justices Powell and Stevens, their voting records must be compared with those of the Court's major liberals, Justices Brennan and Marshall, and the Court's foremost conservatives, Chief Justice Rehnquist and former Chief Justice Burger. A comparison of the frequency with which Burger and Rehnquist voted together and the frequency with which Powell agreed with these conservatives reveals that Powell is firmly entrenched in the conservative camp. Burger and Rehnquist had an 82% agreement rate for

ration of powers and federalism. Because many commentators regard these justices as moderates,[3] this debate has attracted relatively little attention.[4] Nevertheless, the justices' prolonged and often heated dialogue

---

the 1976-1985 Terms, the last four of which they agreed at a rate of 88%. Powell agreed with Burger and Rehnquist at a ten-term average rate of 77%, and at an average of 84% for the last four years of those terms. Brennan, on the other hand, agreed with the conservative faction only 46% of the time during the same period. Brennan and Marshall voted together 90% of the time over the last 10 years. Powell voted with Brennan and Marshall at a ten-term average rate of 53%. Even justices in opposing factions agree with one another at least 40% of the time; for example, from 1976-1985, Brennan and Burger agreed 46% of the time and Brennan and Rehnquist agreed 40% of the time. Therefore, Powell's agreement rate with the liberal faction is surprisingly low.

Stevens is more of a centrist. He averaged a 55% agreement rate with Burger and Rehnquist during the last 10 terms and the last four terms. Although Stevens' voting record is more similar to Brennan's, who agreed with the conservative faction 46% of the time, than to Powell's, who agreed with the conservatives 77% of the time, Stevens' average agreement rate with the liberal justices, Brennan and Marshall, was 62% for the last 10 terms, and 68% for the last four terms. Stevens' 62% liberal and 55% conservative average agreement rates differ significantly from Powell's 53% liberal and 77% conservative average agreement rates. Stevens may be characterized as slightly more liberal than conservative, yet independent from a distinct political faction, while Powell may be accurately identified as a conservative.

Less than one-third of all Supreme Court decisions are decided by a five-to-four vote. Of 145 decisions in the 1986 Term, 45 cases were five-to-four decisions. *The Supreme Court, 1986 Term — Leading Cases*, 101 HARV. L. REV. 119, 365 (1987). Stevens voted with the majority in 18 of these 45 cases and Powell in 35. In the 1985 Term, Powell cast the swing vote in 78% of the split decisions, but created a liberal majority in only five percent of the five-to-four decisions. *The Supreme Court, 1985 Term — Leading Cases*, 100 HARV. L. REV. 100, 307 (1986). Powell's voting record reveals that he firmly supported the Court's conservative faction. Powell voted with Burger and Rehnquist in 84% of the cases decided in the 1986 Term. *The Supreme Court, 1986 Term — Leading Cases*, 101 HARV. L. REV. 119, 362-65 (1987).

Stevens' position is less ideologically clear than Powell's. In the 1986 Term, Stevens cast the swing vote in 18 cases, voting 13 times with Brennan and Marshall and five times with Rehnquist. Stevens sided with the conservatives approximately as frequently as did Justice Brennan. During the 1982 through 1986 Terms, Stevens voted with Brennan and Marshall in 68% of the cases.

Comparison of Powell's and Stevens' voting records further supports the conclusion that neither may be accurately labelled as centrist. During their joint tenures on the Supreme Court, Justices Powell and Stevens agreed an average of 56% of the time, while disagreeing an average of 43% of the time. Thus the rate at which Stevens and Powell agreed with each other differs only slightly from Stevens' 55% average agreement rate with the conservative faction, and Powell's 53% average agreement rate with the liberal contingent. Ironically, these two justices, who have both been labeled centrists, agreed only slightly more frequently than they disagreed.

3. Recent commentary characterizing Powell as a centrist includes: Taylor, *Powell's Pivotal Votes Marked '87 Court Term*, N.Y. Times, June 28, 1987, at 1, col. 1; Roberts, *In the Balance: Reagan Gets His Chance to Tilt the High Court*, N.Y. Times, June 28, 1987, at E1, col. 1. Sitomer, in the Christian Science Monitor, said that Powell was "[k]nown as the man-in-the-middle . . . a balancer, a compromiser, a tipper of judicial scales," *The High Court's New 'Pivot'?*, Christian Science Monitor, July 2, 1987, at 27, col. 1.

4. The few articles written specifically about these justices do not address their long-term debates or the significance of their relationship. *See, e.g.*, Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987); Gun-

has significantly influenced our constitutional law.[5] Rather than acting as "centrists", Powell and Stevens have often been important and decisive voices on the Court. This Article studies the relationship, politics, and ideologies of these two justices. The Article surveys Powell's and Stevens' opinions in a variety of areas of law in order to give perspective to their debates, and shed light on how the debates affect the development of constitutional law.

Part I of this Article analyzes Powell's and Stevens' debate on separation of powers, focusing in particular on their views of the Court's role in implying rights of action under federal statutes and the Constitution. Part II examines federalism issues arising under the Tenth and Eleventh Amendments, as well as abstention and preemption issues that have divided Powell and Stevens. The Conclusion of this Article presents an assessment of the justices' views and the effects of their debates.

I. Separation of Powers Between the Congress and Federal Courts

A. Implying Private Rights of Action under Federal Statutes

Stevens and Powell consistently differed in their approaches to judicial implication of private rights of action under federal statutes. Powell argued that the Court's implication of private rights of action under federal statutes usurped legislative authority. Stevens believed that because the traditional role of courts is to remedy legal wrongs, courts have a duty to imply damages to enforce statutory rights. This subsection explores major cases in which the justices confronted this issue.

Justice Stevens recognized the power of federal courts to imply damages and to fashion appropriate remedies for deprivations of statutory

ther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972); Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1972); Maltz, *Portrait of a Man in the Middle—Mr. Justice Powell, Equal Protection, and the Pure Classification Problem*, 40 OHIO ST. L.J. 941 (1979); Yackel, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICH. L. REV. 181 (1975); Urofsky, *Mr. Justice Powell and Education: The Balancing of Competing Values*, 13 J. L. & EDUC. 581 (1984); Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987); Note, *Death and a Rational Justice: A Conversation on the Capital Jurisprudence of Justice John Paul Stevens*, 96 YALE L.J. 521 (1987). *See also Symposium* 68 VA. L. REV. 161 (1982) (5 articles and 3 dedications are concerned with Justice Powell).

5. This Article analyzes Supreme Court jurisprudence solely by examining the writings of Justices Powell and Stevens. The author studied every case in which both justices wrote an opinion, or in which one justice wrote the majority opinion and the other joined a separate concurrence or dissent. The Article focuses on cases involving the structure of government, federalism, and separation of powers.

benefits in the absence of specific congressional directives,[6] when plaintiffs fit within the class of persons for whose benefit Congress enacted the legislation.[7] Stevens strongly advocated private remedies for violation of the following statutes: section 901 of Title IX of the Education Amendments of 1972,[8] Title VI of the Civil Rights Act of 1964,[9] the Commodity Exchange Act of 1936,[10] section 206 of the Investment Advisers Act of 1940,[11] section 10(b) of the 1934 Securities Exchange Act,[12] the Federal Water Pollution Control Act,[13] and the Marine Protection, Research and Sanctuaries Act of 1972.[14]

Stevens explained his views in his *Cannon v. University of Chicago* plurality opinion.[15] Relying on the four-part test of *Cort v. Ash*,[16] Justice Stevens determined that the plaintiff had a damages action under Title IX because (1) she was within the class of persons protected by the statute;[17] (2) Congress intended to create a private right of action when it modeled Title IX on Title VI;[18] (3) a private cause of action was consis-

6. *See, e.g.*, Heckler v. Day, 467 U.S. 104, 120 (1984) (Marshall, J., dissenting, Stevens, J., joining).

7. *See generally* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981) (Stevens, J., concurring in part and dissenting in part).

8. 20 U.S.C. § 1681 (1982). *See* Cannon v. University of Chicago, 441 U.S. 677 (1979).

9. 42 U.S.C. § 2000d (1982). *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 635 (1983)(Stevens, J., dissenting).

10. 7 U.S.C. §§ 1-26 (1982 & Supp. IV 1986). *See* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982).

11. 15 U.S.C. § 80b-1 (1982). *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 25 (1979) (White, J., dissenting, Stevens, J., joining).

12. 15 U.S.C. § 78(b) (1982). *See* Herman & MacLean v. Huddleston, 459 U.S. 375 (1983). *Herman* was a unanimous decision of the Court, but Justice Powell did not participate.

13. 33 U.S.C. § 1251 (1982 & Supp. III 1985).

14. 33 U.S.C. § 1401 (1982 & Supp. III 1985). *See generally* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

15. 441 U.S. 677 (1979). In *Cannon,* the plaintiff alleged that the University of Chicago violated Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1686, by discriminating against women in its medical school admissions. The district court dismissed her suit on the theory that Title IX neither expressly nor impliedly created a private right of action. The court of appeals ruled that termination of federal funding was the exclusive remedy for a Title IX violation. A divided Supreme Court reversed.

16. 422 U.S. 66 (1975).

17. *Cannon*, 441 U.S. at 694.

18. *Id.* at 703. Title IX contains provisions similar to the provisions in Title VI, which lower courts have interpreted to include a private cause of action. *See id.* at 694-703. Focusing on "the contemporary legal context", Stevens concluded, "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." *Id.* at 699. Stevens also discerned Congress' intent to permit private rights of action under Title IX from a review of the post-Title IX enactment of the Civil Rights Attorneys Fees Statute, 42 U.S.C. § 1988 (1982), which included Title IX among

tent with the legislative purpose to prevent discrimination;[19] and (4) since the Civil War the federal government has traditionally acted as a major opponent of discrimination.[20]

Although Stevens managed to garner support from a plurality of the Court in *Cannon*, Justice Powell vigorously dissented,[21] arguing that by implying a private right of action when Congress has been silent, the federal court usurped Congress' legislative function.[22] Powell maintained that when a statute specifically provides alternative enforcement mechanisms, courts should not create other remedies.[23] He particularly criticized the four-part test of *Cort v. Ash*, finding only the legislative intent factor relevant, and referring to the other *Cort* factors as "independent judicial lawmaking."[24] He called on the Court to overrule *Cort*, complaining that in at least twenty decisions, federal appeals courts had used *Cort* to imply private rights of action in federal statutes.[25] Powell argued that Congress could not "absentmindedly" have omitted private causes of action in all those cases.[26] According to Powell, the judiciary overstepped its bounds by freely implying private actions.[27]

Besides the unconstitutionality of extending federal jurisdiction and of judicial lawmaking, Powell argued that *Cort* presented another problem: it encouraged Congress to avoid resolving politically difficult issues by relying on politically insulated courts to tackle the troublesome issue of private remedies.[28] He protested that this reliance on the courts undermined the democratic process.[29]

Powell's view gained majority acceptance in *Middlesex County Sewerage Authority v. National Sea Clammers Association*.[30] In *Middlesex*, the Court restricted its analysis to the issue of congressional intent. Powell's majority opinion echoed the arguments he presented in his *Cannon*

---

the actions for which attorney's fees are available to prevailing plaintiffs. *Cannon*, 441 U.S. at 706 n.41.

19. *Cannon*, 441 U.S. at 707.

20. *Id.* at 708.

21. *Id.* at 730 (Powell, J., dissenting).

22. *Id.* at 743.

23. *Id.* at 748.

24. *Id.* at 740.

25. *Id.* at 741-42.

26. *Id.* at 742.

27. "By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This . . . conflicts with the authority of Congress under Art. III to set limits of federal jurisdiction." *Id.* (footnote and citations omitted).

28. *Id.* at 743.

29. *Id.* at 747.

30. 453 U.S. 1 (1981).

dissent: if a court looks beyond legislative intent, it violates the doctrine of separation of powers. Dissenting in part in *Middlesex*, Stevens bemoaned the effect of Powell's approach.[31]

Powell did not join the majority in the only two post-*Cannon* cases in which the Court implied private remedies from federal statutes. In *Herman & MacLean v. Huddleston*,[32] the Court unanimously held that section 10(b) of the 1934 Securities Exchange Act[33] contained an implied private right of action. Powell did not participate in *Herman & MacLean*. In *Merrill Lynch, Pierce, Fenner & Smith v. Curran*,[34] Powell registered a strong dissent. Writing for the majority, Stevens found that the Commodity Exchange Act[35] included a private right of action. As he had in *Cannon*, Stevens reasoned that when a statute is silent on the issue of remedies, the Court must look to the "contemporary legal context", including recently decided cases, to determine congressional intent.[36]

Powell's response was consistent with his dissent in *Cannon*.[37] He argued that the Court's action violated principles of separation of powers and traditional tests for discerning congressional intent.[38] He criticized the majority for interpreting congressional silence as congressional intent to create a private cause of action.[39] In addition, Powell argued that because the penalty for congressional silence was the risk of having erroneous opinions imputed to Congress itself, Stevens' reasoning obligated the legislature to respond to lower court opinions.[40] Powell reiterated his view that courts should respect the careful and complex balances Congress writes into its regulatory schemes.[41] Absent compelling evidence of congressional intent, the courts should refuse to create a cause of

31. *Id.* at 22. (Stevens, J., concurring in part and dissenting in part). Despite Stevens' complaints, other justices agreed with Powell's arguments for denying implied remedies for violations of federal statutes. The Court's shift away from Stevens' view began before *Middlesex*. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).

32. 459 U.S. 375 (1983).

33. 15 U.S.C. § 78a-kk (1934).

34. 456 U.S. 353 (1982).

35. 7 U.S.C. §§ 1-26 (1982 & Supp. IV 1986).

36. *Merrill Lynch*, 456 U.S. at 381. Stevens referred to a history of lower courts implying a private right of action under the Commodity Exchange Act. Stevens presumed that Congress was aware of those decisions when it amended the Act and did not expressly preclude a private remedy.

37. *See supra* text accompanying notes 21-27.

38. *Merrill Lynch*, 456 U.S. at 395-96 (Powell, J., dissenting).

39. *Id.* at 402.

40. *Id.* at 408.

41. *Id.*

action.[42]

In the implied cause of action cases, there is an intense debate between Powell and Stevens. Both justices drafted opinions responding to the other's view on court interpretation of congressional intent. This debate was not only a dialogue between the two justices, but also a means of developing constitutional law. Stevens argued that courts must have the power to fill the remedial gaps in statutes that Congress enacted to benefit particular classes of people. This furthers congressional intent by assuring remedies for wrongs that Congress clearly sought to redress. In contrast, Powell believed that Stevens' approach violated the doctrine of separation of powers by allowing federal courts to create remedies at law, a function constitutionally delegated to Congress. Stevens' argument protected individuals whose congressionally granted rights were infringed; Powell's protected the distribution of governmental powers between the courts and Congress. Although Powell first expressed his opinion in dissent, he eventually persuaded a majority of the Court to join him.

B. Implying Causes of Action Directly Under the Constitution

Powell and Stevens also disagreed over the Court's power to create implied private causes of action under the Constitution. After the Court recognized a private cause of action for violation of an individual's fourth amendment rights in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[43] it began to examine whether violations of other constitutional rights supported private causes of action. In *Davis v. Passman*,[44] an administrative assistant to a member of Congress sued her employer for firing her solely because she was a woman. Since she had been on a federal congressional staff, Title VII did not apply and she based her claim on the Fifth Amendment. Justice Brennan, with Justice Stevens joining the five-member majority, applied the *Bivens* rationale to find a private damages action for violation of the equal protection component of the Fifth Amendment Due Process Clause.

Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented from the majority in *Davis*. Writing separately, Powell described the majority decision as an affront to principles of separation of

42. *Id.* As recently as 1987, Powell and Stevens disagreed on whether a private cause of action for damages under 42 U.S.C. § 1983 could be used to enforce tenants' rights secured by federal law. Wright v. City of Roanoke Redevelopment and Housing Auth., 107 S. Ct. 766 (1987).

43. 403 U.S. 388 (1971) (Brennan, J., writing for the majority). *Bivens* was decided before Stevens and Powell were appointed to the Court.

44. 442 U.S. 228 (1979).

powers and comity.[45] He stated that the judiciary should be powerless to interfere in the hiring practices of Congress, an equal branch of government,[46] unless Congress violates its own employment standards.[47]

Powell further criticized the majority for failing to exercise "principled discretion."[48] Even if the Court may hear this type of case, he argued, it has no *obligation* to permit private suits absent congressional authorization.[49] Powell stressed that the judiciary must carefully consider the concerns of equal and coordinate branches of government before creating implied causes of action for their employees under provisions of the Constitution.[50] Powell believed that Congress had deliberately excluded itself from Title VII's prohibition against discriminatory employment practices because members of Congress need to have absolute confidence in their staff.[51]

Powell's disenchantment with the result in *Davis* did not prevent him from joining the majority in *Carlson v. Green*.[52] In *Carlson*, the Court found that a federal prisoner could bring a private cause of action directly under the Constitution to remedy eighth amendment violations. Although he concurred in the result, Powell vehemently disagreed with the majority's suggestion that implied causes of action for constitutional violations could be defeated only in limited circumstances.[53]

Powell's view eventually prevailed.[54] Since *Carlson*, plaintiffs have generally failed to sustain implied private damages actions under the Constitution.[55] Powell joined the majority in each of the opinions failing

45. *Id.* at 251 (Powell, J., dissenting). Chief Justice Burger also expressed dismay at this encroachment upon the separation of powers. Justice Stewart dissented separately, and Justice Rehnquist joined all three dissents.

46. For the same reason, Justice Powell also disapproved of judicial interference in executive hiring decisions. *See* Branti v. Finkel, 445 U.S. 507, 521 (1980) (Powell, J., dissenting).

47. *Davis*, 442 U.S. at 254-55 (Powell, J., dissenting).

48. *Id.* at 252, 254.

49. *Id.* at 252.

50. *Id.*

51. *Id.* at 254.

52. 446 U.S. 14 (1980). In *Carlson*, an action brought on behalf of a prisoner who died after being injured in jail, the plaintiffs claimed that the authorities' failure to provide proper medical treatment violated the prisoner's eighth amendment rights.

53. *Id.* at 27-29. (Powell, J., concurring in part and concurring in judgment).

54. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296 (1983); Bush v. Lucas, 462 U.S. 367 (1983); United States v. Stanley, 107 S. Ct. 3054 (1987).

55. Although *Bivens* has not been overruled, the Court has found each case since *Bivens* to fall within one of its exceptions. Plaintiffs were denied relief in Chappell v. Wallace, 462 U.S. 296 (1983) (unanimous decision denying black navy men a constitutionally derived damages action against their commander for racial discrimination; decision based on the special factors of military discipline and Congress' activity in the field); Bush v. Lucas, 462 U.S. 296 (1983) (unanimous opinion by Stevens denying a federal employee a constitutionally based remedy against his supervisor for alleged violation of his first amendment rights; decision based on

to find constitutionally implied private damages actions. When the Court has found constitutionally derived causes of action to exist, Powell has consistently written that implication of a private constitutional cause of action should be the exception and not the rule.[56]

Powell's and Stevens' disagreement on implied rights of action stemmed in large part from their conflicting views on the role of the judiciary. Powell firmly believed that the Court, as one of three equal branches of government, lacked the power to create implied damages actions. Stevens, on the other hand, emphasized the unique functions of the judiciary. Stevens argued that courts exist to provide remedies for legal wrongs, such as statutory and constitutional violations. For Stevens, these cases did not threaten the separation of powers, rather they allowed courts to exercise their traditional powers to do justice by interpreting congressional schemes.

C. Other Cases on the Separation of Powers Between Courts and Congress

Powell applied his separation of powers principles to other areas. *Heckler v. Day*[57] involved the courts' power to fashion a remedy for Social Security disability claimants whose cases had been unresolved for an inordinate amount of time. A federal district court judge ordered the state to decide all reconsideration petitions within ninety days.[58] Writing for the five-member majority, Powell found that the district court's action violated separation of powers principles because it intruded upon the discretionary power that Congress had vested in the Secretary of Health and Human Services.[59]

Stevens joined Marshall's dissent in *Heckler*.[60] The dissenters

existing, comprehensive remedial system exception to *Bivens*); and United States v. Stanley, 107 S. Ct. 3054 (1987) (five-to-four decision, with Powell in the majority and Stevens dissenting, denying a serviceman a cause of action under the Due Process Clause for damage to his personality from nonconsensual administration of LSD; decision based on military discipline and alternative remedy exceptions to *Bivens*).

56. *See* Davis v. Passman, 442 U.S. 228, 251 (1979) (Powell, J., dissenting); Carlson v. Green, 446 U.S. 14, 25 (1980) (Powell, J., concurring in part and concurring in judgment).

57. 467 U.S. 104 (1984).

58. *Id.* at 110.

59. *Id.* at 118-19. Congress had considered imposing mandatory deadlines, but consistently refused to enact them. *Id.* at 116. Powell found Congress' inaction unmistakable evidence of congressional intent *not* to impose mandatory deadlines. *Id.* at 117-18. Powell repeatedly used the concept of "unmistakable congressional intent" to limit the federal courts' power to act. *See, e.g.*, Pennhurst State School and Hosp. v. Halderman (*Pennhurst II*), 465 U.S. 89 (1984); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), *reh'g denied*, 473 U.S. 926 (1985) and Welch v. State Dep't of Highways and Public Transp., 107 S. Ct. 2941 (1987).

60. *Heckler*, 467 U.S. at 120 (Marshall, J., dissenting).

viewed the district court's action as an appropriate remedial order. In accordance with Stevens' examination of congressional intent in *Cannon*[61] and *Merrill Lynch*,[62] Marshall analyzed the contemporary legal context of the issue. Marshall and Stevens argued that although Congress did not create a nationwide deadline for resolution of claims, it did not intend to curtail judicial innovation or the equitable power of the courts to grant claimants their statutory entitlements.[63]

In 1986, however, Powell persuaded Stevens that implying a cause of action would violate congressional intent. In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,[64] Stevens, writing for the majority, did not question that the federal Food, Drug and Cosmetic Act (FDCA)[65] did not create a private cause of action for misbranding.[66] Furthermore, the *Merrell Dow* majority found that Congress' failure to create affirmatively a private cause of action revealed its intention to prevent injured individuals from suing in federal court.[67]

With the exception of *Merrell Dow*, Powell and Stevens ardently disagreed about implied rights of actions and implied remedies. Powell viewed judicial implication of private damages as a violation of separation of powers principles. Stevens, on the other hand, believed that the judiciary was obligated to imply remedies for wrongs, especially when congressional statutes were silent.

In his opinions, Powell adamantly argued that expansive judicial interpretation of the nature or scope of legislation cut at the fabric of our tripartite governmental structure. Therefore, he interpreted congressional silence on private remedies as an intentional prohibition against court action. For Powell, congressional silence limited the power of the federal courts to act; for Stevens, it unleashed it. Justice Stevens, with Justice Brennan's guidance from *Cort*, solved the problem of congressional silence in a manner that loosened the bindings on courts' wrists: he would permit courts to act unless Congress affirmatively prohibited court action. Both Powell and Stevens claimed to deduce congressional intent

61. *See supra* notes 15-20 and accompanying text.

62. *See supra* notes 34-36 and accompanying text.

63. *Heckler*, 467 U.S. at 130 (Marshall, J., dissenting).

64. 106 S. Ct. 3229 (1986).

65. 21 U.S.C. § 301 (1982 & Supp. II 1984) (amending ch. 675, § 1, 52 Stat. 1040 (1938)).

66. *Merrell Dow*, 106 S. Ct. at 3237. Plaintiffs sought damages for the birth defects their children allegedly suffered as a result of the plaintiffs' ingestion of Bendectin, a morning sickness drug, during pregnancy. Plaintiffs alleged that the drug was misbranded in violation of the FDCA, and that violation of the federal statute was negligence per se under state tort law.

67. *Id.* at 3237. The *Merrell Dow* majority opinion does not shed light on the reasoning behind Stevens' significant shift.

from congressional silence and to comply with separation of powers principles.

II. The Federalism Debates

The Powell-Stevens debates extended beyond the subject of separation of powers between the legislature and the judiciary. The justices also held differing opinions on the proper allocation of powers between state and federal governments. Frequently writing for the majority on this issue, Powell stressed the role of the Tenth and Eleventh Amendments in preserving states' rights by specifically limiting the powers of Congress and the federal courts. Stevens, along with the other dissenters, repeatedly rejected Powell's approach as an overly restrictive intrusion on legitimate exercises of federal power.[68]

In addition to tenth and eleventh amendment issues, Powell and Stevens debated the judicially developed doctrines of abstention and preemption. Their different conceptions of national unity and state sovereignty are reflected in the Court's division over these federalism issues. Many of the federalism cases were decided by five-to-four votes. Powell emerged as a spokesperson on federalism issues, frequently writing majority opinions. The Powell-Stevens debates on eleventh amendment issues are a potent resource for examining their conflicting views and their judicial relationship. Further, Powell ended his career on the Supreme Court with an opinion on the Eleventh Amendment that reinforced his consistent vision of federalism.[69]

A. State Sovereignty, Federal Courts, and the Eleventh Amendment

Although Justices Powell and Brennan were the primary players in the Court's recent debate on the scope of state immunity from suit in federal court, Stevens also performed a vital role. Stevens' and Powell's clash over eleventh amendment matters during their joint tenure on the Court reached a peak in the 1984 case of *Pennhurst State School and Hospital v. Halderman* (*Pennhurst II*).[70]

Prior to *Pennhurst II*, Justice Rehnquist had assumed the role of spokesperson for eleventh amendment doctrine. His majority decisions in *Edelman v. Jordan*,[71] *Fitzpatrick v. Bitzer*,[72] and *Quern v. Jordan*[73]

68. *See infra* notes 70-89 and accompanying text.
69. Welch v. State Dep't of Highways and Public Transp., 107 S. Ct. 2941 (1987).
70. 465 U.S. 89 (1984).
71. 415 U.S. 651 (1974).
72. 427 U.S. 445 (1976).
73. 440 U.S. 332 (1979).

severely restricted plaintiffs' opportunities to receive compensatory damages from a state in federal court for state-caused deprivations of rights or statutory benefits. Justice Brennan opposed interpreting the Eleventh Amendment as immunizing states from suits by their own citizens.[74] Justice Stevens had a less radical approach to eleventh amendment jurisprudence than Brennan, but he was more willing than Powell or Rehnquist to grant plaintiffs remedies in federal court for state transgressions. He authored three decisions addressing eleventh amendment questions before *Pennhurst II*.[75] In each case, Powell wrote a strong dissent on the eleventh amendment issues.

Beginning with *Pennhurst II*, Powell articulated the Court's majority position, which sharply curtailed the possibility of plaintiffs obtaining any federal court relief against a state, its departments, or its agents.[76] He even announced a major retrenchment of his eleventh amendment theory in an opinion handed down in his last week on the Court.[77] Justice Stevens consistently sought to undermine Powell's majority approach to state immunity from suit in federal court by joining the dissent in five-to-four decisions on the issue.[78] This dramatic split exemplifies the disparate views of the Court's two factions about the meaning and

74. Brennan's approach differed significantly from the majority because he consistently argued that the Eleventh Amendment, by its clear terms, does not bar remedies for citizens suing their own states in federal court. Brennan argued that any such bar must be based on common-law sovereign immunity. He then argued that there could be no bar based on common-law sovereign immunity because states had surrendered their common-law sovereign immunity by granting power to the federal government when they ratified the Constitution. Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 319 (1973) (Brennan, J., dissenting). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976) (Brennan, J., concurring); Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting). After repeated and eloquent attempts to achieve a majority on this theory, and after Justice Powell had become the majority spokesperson on eleventh amendment issues, Justice Brennan changed his strategy. He focused instead on the need to reexamine the origin of the Eleventh Amendment and to expose the historical illegitimacy of the ancestral eleventh amendment case, Hans v. Louisiana, 134 U.S. 1 (1890). *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 260, (Brennan, J., dissenting), *reh'g denied*, 473 U.S. 926 (1985).

75. Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982); Maher v. Gagne, 448 U.S. 122 (1980); Hutto v. Finney, 437 U.S. 678 (1978), *reh'g denied*, 439 U.S. 1122 (1979).

76. *See* Welch v. State Dep't of Highways and Public Transp., 107 S. Ct. 2941 (1987); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), *reh'g denied*, 473 U.S. 926 (1985); Pennhurst State School and Hosp. v. Halderman (*Pennhurst II*), 465 U.S. 89 (1984). Since 1984, only two eleventh amendment majority opinions have been written by other justices. Papasan v. Allain, 478 U.S. 265 (1986) (White wrote the five-justice majority opinion on the eleventh amendment issue; Powell concurred, although he dissented on the equal protection issue); Green v. Mansour, 474 U.S. 64 (1985) (Rehnquist wrote the five-to-four majority opinion with Powell joining.)

77. *Welch*, 107 S. Ct. 2941; *see infra* text accompanying notes 118-124.

78. *See infra* text accompanying notes 90-94, 109-112, & 125.

demands of federalism. If Justice Powell's replacement, Justice Kennedy, is as strong an advocate of state sovereignty as Powell was, his presence will have little effect on the split, but in any case the Court will have to deputize a new majority writer.

Powell and Stevens took opposing positions in *Pennhurst II*,[79] as they had in *Cannon*[80] and *Merrill Lynch*.[81] In *Pennhurst II*, however, the majority sided with Powell. Writing for five justices, Powell determined that the Eleventh Amendment and concomitant considerations of state sovereignty deprived the district court of the power to order state officials to conform their conduct to state law.[82] Powell declared that the Eleventh Amendment's protection of state sovereign immunity imposes a constitutional limitation on federal judicial power.[83] He characterized eleventh amendment sovereign immunity as a federalism issue involving the proper allocation of power between federal courts and state governments. Powell found that suits against state officials are barred by the Eleventh Amendment when the state is the real party in interest, whether the plaintiff is a citizen of that state or of another, and whether the suit seeks damages or injunctive relief.[84]

Powell acknowledged exceptions to the eleventh amendment bar when the state unequivocally waives its immunity by consenting to suit in federal court, when Congress has clearly expressed its intention to abrogate state immunity pursuant to its enforcement power under section five of the Fourteenth Amendment, and when a state officer has violated a federal right.[85] Powell found no evidence of waiver or congressional abrogation of state immunity in the context of *Pennhurst II*.[86] Neither

79. 465 U.S. 89. In *Pennhurst II*, mentally retarded state hospital residents challenged the conditions in the facility, and the failure of state and county officials to provide adequate housing, training, and counseling. They alleged violations of their constitutional rights, as well as violations of their federal and state statutory rights. *Id.* at 92. The Supreme Court was asked to review the decision of the lower federal court which, upon finding violations of Pennsylvania law, had ordered state officials to close the hospital, remove the patients from the institution, and place them in the "least restrictive environment consistent with each individual's" needs.

80. 441 U.S. 677 (1979). For a discussion of the debate between Powell and Stevens on the implication of private remedies under federal statutes, see *supra* notes 6-42 and accompanying text.

81. 456 U.S. 353 (1982). See *supra* notes 34-42 and accompanying text for a discussion of this case and Powell's and Stevens' positions.

82. *Pennhurst II*, 465 U.S. at 106.

83. *Id.* at 116.

84. *Id.* at 102.

85. For explanation of the exceptions to the eleventh amendment bar, see Welch v. State Dep't of Highways and Public Transp., 107 S. Ct. 2941; *Atascadero*, 473 U.S. 234; and *Pennhurst II*, 465 U.S. 89.

86. 465 U.S. at 103 n.12.

did he find that *Pennhurst II* fit within the doctrine of *Ex parte Young*,[87] which permits plaintiffs to obtain equitable relief against state officials for violation of federal law.

Powell concluded that claims for relief against state officials for violations of state law are barred even if the state law claims are pendent to federal causes of action.[88] Pendent jurisdiction, Powell reasoned, is a judicially created doctrine, and must therefore yield to the constitutional limitations of the Eleventh Amendment. He acknowledged that this rationale could result in bifurcation of claims, but concluded that bifurcation is an acceptable price to pay for adherence to principles of federalism and sovereign immunity.[89]

In his dissenting opinion, Stevens argued that a state official who violates state law is not acting on behalf of the state for purposes of eleventh amendment state immunity.[90] Stevens explained that a sovereign authorizes state officials to enforce state laws, not to violate state laws, whether the violation is in good faith, negligent, or intentional.[91] He concluded that government officials are stripped of sovereign immunity if they act beyond the scope of their authority, or if they act in violation of state law.[92] The Eleventh Amendment, he said, does not require any other rule.

The conflict between Powell and Stevens reached its peak on the issue of eleventh amendment immunity. Stevens, with whom Justices Brennan, Marshall, and Blackmun agreed, accused Powell of flouting

87. 209 U.S. 123 (1908). *Young*, Powell argued, is a narrow exception to the eleventh amendment bar. The *Young* exception was designed to preserve federal supremacy and vindicate federal interests in the few situations when those interests directly conflict with state sovereignty. *Pennhurst II*, 465 U.S. at 105. Powell concluded that *Young* must be applied with the utmost care and circumspection because it treads on fundamental notions of state sovereignty. In Edelman v. Jordan, 415 U.S. 651 (1974), Powell reasoned that a strong national commitment to federalism and respect for state sovereignty dictated limiting the application of *Young*. *Edelman* established a balance between federal supremacy and state sovereignty by limiting remedies against state officials in situations like *Young* to equitable, prospective relief, because that type of relief does not intrude upon state coffers.

Justice Powell explained further in *Pennhurst II* that *Young* and *Edelman* are only relevant to cases in which there is a dangerous conflict between principles of federal supremacy and state sovereignty. *Pennhurst II*, 465 U.S. at 105. Powell found that no such conflict existed in *Pennhurst II*, because state officials were accused of violating state law. Therefore the narrow *Young-Edelman* exception was inapplicable, and the general rule barring all relief against a state or state official in federal court applied. *Id.* at 106.

88. *Pennhurst II*, 465 U.S. at 122.

89. *Id.* at 147.

90. *Id.* at 147 (Stevens, J., dissenting).

91. *Id.* at 150.

92. *Id.* at 157.

twenty-eight precedential cases and a century of jurisprudence.[93] Stevens inveighed against the majority's misuse of the concept of federalism, and denounced the consequence of the ruling, which would force plaintiffs to split their causes of action between state and federal courts. Powell, as highly critical of Stevens' dissent as Stevens was of Powell's majority, answered Stevens' contentions in the text of the majority opinion.[94] Powell remarked in an *ad hominem* tone that "Justice Stevens' dissent rests on fiction, is wrong on the law, and most important would emasculate the Eleventh Amendment."[95]

The distinctions between Powell's and Stevens' federalism ideologies are the most interesting aspect of their *Pennhurst II* opinions. Powell argued that federalism means respect for state sovereignty in all its manifestations. Under Powell's interpretation of the Eleventh Amendment, federal constitutional supremacy is the only check on state sovereignty and its attendant immunity. Powell concluded that permitting the *Pennhurst II* suit to be heard in federal court would be an affront to federalism.

Stevens contended that his understanding of the Eleventh Amendment was more compatible with federalism concerns than Powell's. According to his view, federalism is bolstered when federal courts require state officers to follow state laws, and not when federal courts permit state officers to ignore state mandates. Stevens added that Powell's rule required the splitting of causes of action; a procedure more likely to cause friction between state and federal courts than a rule requiring federal courts to respond to plaintiffs' claims that they have been harmed by state officers acting inconsistently with state law. Both Powell and Stevens justified their opposing conclusions by relying on the requirements of federalism, although Stevens may have used federalism arguments merely in response to Powell.

The dust had barely settled after the *Pennhurst II* decision when Powell took advantage of another opportunity to strengthen state immunity under the Eleventh Amendment.[96] In *Atascadero State Hospital v.*

93. *Id.* at 165-66 n.50.

94. *Id.* at 106.

95. *Id.*

96. Between *Pennhurst II* and Atascadero State Hosp. v. Scanlon, 473 U.S. 234, *reh'g denied*, 473 U.S. 926 (1985), Powell wrote the majority opinion in County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). *Oneida* concerned Native American property claims arising from land sales made 175 years before the suit was instigated in alleged violation of the Nonintercourse Act of 1793. The Native Americans sued the County, and the County in turn sued the state for indemnification. The federal court exercised ancillary jurisdiction over the county's indemnification claim. Powell held that the indemnification claim was barred by the Eleventh Amendment. Surprisingly, Stevens agreed with Powell's rulings on the Eleventh

Scanlon,[97] Powell, again writing for the majority on a deeply divided court, determined that the plaintiff's federal claim for damages against California was barred by the Eleventh Amendment. He reiterated the three exceptions to eleventh amendment immunity from *Pennhurst II*.[98] Justice Powell held that a state's waiver of immunity and consent to suit must be express and unequivocal, and must refer specifically to federal court.[99] He rejected the plaintiff's argument that a provision of the California Constitution waiving the state's immunity from suit[100] served to waive its eleventh amendment immunity from suit in federal court.[101] According to Powell's view, California's constitutional provision waived its immunity to suit only in California courts.[102] He argued that the provision did not clearly express California's intention to waive its immunity in federal courts, and hence did not satisfy the waiver or consent exception.[103] Powell also examined section 504 of the Rehabilitation Act of 1973[104] and found no "unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States."[105] Powell reasoned that Congress may abrogate states' eleventh amendment immunity only when Congress has made its intention to do so "unmistakably clear in the language of the statute."[106] Finally, he stressed that a state hospital can not be held to have consented to suit in federal court merely because it received federal funds.[107]

Justice Brennan dissented in *Atascadero*, arguing that the original intent of the Eleventh Amendment and section 504 compel a result other than the one Powell reached.[108] Brennan argued that the Eleventh Amendment applies only to those cases based on diversity jurisdiction, not to cases brought under federal question or subject matter jurisdiction.[109] Stevens joined Brennan's dissent, and also wrote a brief separate

Amendment and ancillary jurisdiction, but he dissented from the damage award, arguing that the claim was stale.

97. 473 U.S. 234, *reh'g denied*, 473 U.S. 926 (1985). In *Atascadero*, a physically handicapped job applicant alleged that a California state hospital's refusal to hire him was based on his handicap, in violation of section 504 of the Rehabilitation Act of 1973. 87 Stat. 394 (1973), *amended by* 29 U.S.C. § 794 (1982).

98. *Atascadero*, 473 U.S. at 237-41; *see supra* notes 85-87 and accompanying text.

99. *Atascadero*, 473 U.S. at 240.

100. CAL. CONST. art. III, § 5.

101. *Atascadero*, 473 U.S. at 241.

102. *Id.*

103. *Id.*; *see supra* note 85 and accompanying text.

104. 29 U.S.C. § 794 (1973) (amended 1986).

105. *Atascadero*, 473 U.S. at 240

106. *Id.* at 242.

107. *Id.* at 247.

108. *Id.* at 299-301 (Brennan, J., dissenting).

109. *Id.* at 301.

dissent[110] in which he called for a fresh examination of the Eleventh Amendment and for overturning both *Hans v. Louisiana*[111] and *Edelman v. Jordan*.[112]

Brennan's and Stevens' dissents in *Atascadero* and *Pennhurst II* provoked Powell to respond. In *Atascadero*, Powell addressed Brennan's lengthy dissent in two scathing footnotes, rather than in the text of the majority opinion as he had Stevens' dissent in *Pennhurst II*.[113] He sharply criticized Brennan for "wholly misconceiv[ing] our federal system"[114] and for his "remarkable view of stare decisis."[115] Powell was even harder on Justice Stevens, whom he belittled for his inconsistent positions on stare decisis.[116] In particular, Justice Powell noted that Stevens objected to the majority decision in *Pennhurst II* in part because it trespassed on notions of stare decisis, while in his *Atascadero* dissent Stevens sought to overturn two major eleventh amendment cases and their progeny.[117]

During the week he resigned, in June 1987, Powell issued his last eleventh amendment decision, writing the majority opinion in *Welch v. State Department of Highways and Public Transportation*.[118] Powell's opinion construed the Eleventh Amendment as barring an injured state ferry dock employee from suing a state in federal court under section

110. *Id.* at 304 (Stevens, J., dissenting).

111. 134 U.S. 1 (1890). *Hans* was the first case in which the Court expanded the Eleventh Amendment to provide immunity from suit in federal court to a state that is sued by its own citizens. *Edelman* concluded that the Eleventh Amendment immunized states from judgements for retroactive damages in federal court.

112. 415 U.S. 651 (1974); *Atascadero*, 473 U.S. at 304 (Stevens, J., dissenting); *see supra* notes 71-74 and accompanying text. The same four members of the Court who dissented in *Atascadero* sought, in three subsequent cases, an end to *Hans* and the cases following *Hans* as precedent. Welch v. State Dep't of Highways and Public Transp., 107 S. Ct. 2941, 2965 (1987) (Brennan, J., dissenting); Papasan v. Allain, 478 U.S. 265, 292 (1986) (Brennan, J., concurring in part and dissenting in part); Green v. Mansour, 474 U.S. 64, 74 (1985) (Brennan, J., dissenting).

113. *Atascadero*, 473 U.S. at 240 n.2, 243 n.3.

114. *Id.* at 240 n.2.

115. *Id.* at 243 n.3.

116. *Id.*

117. Yet Powell is also vunerable to criticism on his use of stare decisis doctrine. According to Stevens, Powell lightly discarded a century of precedent in *Pennhurst II* and reconstructed the meaning of *Ex parte Young* in a completely new fashion despite its 80 year history, while he simultaneously relied on stare decisis to adhere to seemingly distorted constructions of the Eleventh Amendment in *Hans* and *Edelman*. Both Justices Powell and Stevens were willing to sacrifice consistency in their arguments about the value of precedent and stare decisis as consistency became an impediment to their ends.

118. 107 S. Ct. 2941 (1987).

thirty-three of the Jones Act,[119] which utilizes remedies created in the Federal Employer's Liability Act (FELA).[120] Powell, quoting his *Atascadero* opinion, argued that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[121] The language of the Jones Act, which brings "[a]ny seaman who shall suffer personal injury in the course of his employment"[122] within its provisions was, therefore, too general to establish the necessary, unmistakable congressional intent to abrogate a state's immunity from suit in federal court.[123] Justice Powell, joined by Chief Justice Rehnquist and Justices White and O'Connor, renewed his commitment to *Hans*, its source in federalism, and its progeny.[124] In response to the four dissenters' tenacious pleas to overrule *Hans*, Powell stressed the value of stare decisis and related his version of constitutional history. As in *Atascadero*,[125] Stevens, along with Justices Marshall and Blackmun, joined Brennan's dissent.

Powell's and Stevens' heated debates on eleventh amendment issues did not wane over the years, as did their debates about implied rights of action. Since the Court's majority is unyielding in its belief that federalism demands maximum protection for states against private suits in federal court, and the dissenters are equally committed to an alternative view of federalism, the Court's fundamental split will probably continue despite Powell's retirement. However, Stevens may be more easily persuaded by a new justice than by his long-time adversary.

---

119. 46 U.S.C. § 688 (1915). Welch was unquestionably entitled to relief under the Jones Act, but question arose as to the proper forum for the suit.

120. 45 U.S.C. §§ 51-60 (1908). Powell's five-justice majority overruled *Parden v. Terminal Railway*, 377 U.S. 1010 (1964), a decision by Justice Brennan, permitting employees of a state-owned railroad to bring actions to redress on-the-job injuries in federal court under the FELA. According to Powell, the *Parden* rationale, whereby the Court concluded that Congress had abrogated states' sovereign immunity by making FELA applicable to all railroads engaged in interstate commerce, did not meet the rigorous standard required to show Congress' clear intent to abrogate state sovereign immunity.

121. *Welch*, 107 S. Ct. at 2943.

122. 46 U.S.C. § 688(a).

123. *Welch*, 107 S. Ct at 2944; *see supra* note 85.

124. Justice Scalia wrote separately to agree with all of the majority opinion except its discussion of *Hans*. *Welch*, 107 S. Ct. at 2957-58. (Scalia, J., concurring in part and concurring in judgment). Because of the complexity of the issues involved in reviewing *Hans* and overruling it after nearly a century, Scalia wrote that he would leave the question for a case in which the parties, rather than *amicus*, raised the issue. Without committing himself to either side of the debate or to an ultimate judgment on *Hans*, Scalia hinted he would opt to retain the *Hans* rule in the interest of stare decisis.

125. Stevens did write a one-paragraph separate dissent in *Atascadero*, but relied primarily on Justice Brennan to express the rationale for his position.

B. Abstention

Like eleventh amendment issues, abstention issues focus on the propriety of federal court review in certain cases.[126] Federal courts have developed abstention doctrines to protect state sovereignty and promote notions of comity and federalism. If abstention is appropriate, a federal court defers jurisdiction to a state court.[127] In some cases, Powell and Stevens agreed about whether abstention was appropriate.[128] However, Stevens generally dissented from opinions in which Powell attempted to expand the abstension doctrine.[129]

Powell and Stevens were at odds on federalism issues in two recent cases raising abstention questions. In *Ohio Civil Rights Commission v. Dayton Christian Schools*,[130] Powell joined Rehnquist's majority opinion. Rehnquist concluded that under the doctrine of *Younger v. Harris*,[131] the

126. For an overview of the abstention doctrine, see B. WRIGHT, THE LAW OF FEDERAL COURTS §§ 52, 52A (4th ed. 1983); M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, ch. 9 (1980).

127. *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Younger v. Harris, 401 U.S. 37 (1971); Burford v. Sun Oil Co., 319 U.S. 313 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 491 (1941). When a federal court abstains, it may dismiss the case entirely or it may retain jurisdiction pending the outcome of the state litigation.

128. *See, e.g.*, Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (unanimous decision that *Pullman* and *Younger* doctrine abstentions were inappropriate); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (Powell and Stevens agreed abstention was proper); Juidice v. Vail, 430 U.S. 327 (1977) (Powell and Stevens agreed abstention would have been proper).

129. *See, e.g.*, Moore v. Sims, 442 U.S. 415, 435 (1979) (Stevens, J., dissenting); Trainor v. Hernandez, 431 U.S. 434, 460 (1977) (Stevens, J., dissenting).

130. 477 U.S. 619 (1986). The dispute in *Dayton Christian Schools* arose when a teacher lodged a sex discrimination complaint with the state civil rights commission against a private religious school that had not renewed her contract because she was pregnant. The Commission investigated her case and eventually initiated administrative proceedings. Rather than participating in the administrative proceedings, the school filed an action under 42 U.S.C. § 1983, seeking a permanent injunction against all state proceedings based on the religion clauses of the First Amendment. The school claimed that the investigation violated its first amendment rights by inquiring into employment policies that were based on sincerely held religious beliefs. The asserted religious belief was that mothers should stay home with their preschool-age children.

131. 401 U.S. 37 (1971). The *Younger* abstention doctrine is based on notions of equity and respect for state functions. *Younger* held that federal courts should not restrain pending state proceedings when federal interference will undermine legitimate state activities or concerns. The *Younger* doctrine arose in the context of a pending state criminal proceeding but has been expanded to apply to various kinds of civil actions. *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (bar disciplinary proceeding); Moore v. Sims, 422 U.S. 415 (1979) (child custody proceeding); Juidice v. Vail, 430 U.S. 327 (1977) (contempt proceeding); Trainor v. Hernandez, 431 U.S. 434 (1977) (civil action to recover wrongful welfare payments); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (public nuisance action).

district court should have abstained from adjudicating the school's section 1983 claim because a pending state administrative proceeding could fully and fairly adjudicate federal constitutional claims. Justice Rehnquist reasoned that the *Younger* abstention doctrine, originally an admonition against federal court interference in pending state criminal proceedings, also applies to pending state administrative proceedings that are judicial in nature, when they concern vital state interests.[132] According to the majority, the district court should have abstained because of the important state interest in eliminating sex discrimination. If the Dayton Christian School had a full and fair opportunity to litigate its constitutional claims in the state administrative proceeding, federal court interference would offend federalism principles.[133] By joining Rehnquist's majority opinion without reservations, Powell reaffirmed his belief that federalism limits the reach of federal courts, even in suits involving 42 U.S.C. section 1983.

Justice Stevens wrote a short opinion, concurring in the judgment, in which he rejected the majority's analysis of the abstention issue.[134] Joined by Justices Brennan, Marshall, and Blackmun, Stevens rejected the Court's application of *Younger*, and discarded the abstention issue in one paragraph of a footnote.[135] Although Stevens ultimately found that the claims lacked merit, he would not have deprived this section 1983 plaintiff of a federal forum to adjudicate its claim.[136]

Justices Powell and Stevens continued their abstention debate in *Pennzoil Co. v. Texaco, Inc.*[137] The question whether the principles of federalism articulated in *Younger v. Harris* precluded the federal district court from enjoining a state proceeding divided the Court and separated Powell from Stevens.[138]

Powell, writing for the majority, concluded that the lower federal courts should have abstained because of the federalism concerns ad-

132. *Dayton Christian Schools*, 477 U.S. at 627 n.2.

133. *Id.* at 627.

134. *Id.* at 629 (Stevens, J., concurring in judgment).

135. *Id.* at 633-34 n.5. Stevens stated that the *Younger* abstention rule "has never been applied to subject a federal court plaintiff to an allegedly unconstitutional state administrative order when the constitutional challenge to that order can be asserted, if at all, only in state court judicial review of the administrative proceeding."

136. *Id.* at 633-34 nn.4-5.

137. 107 S. Ct. 1519 (1987). Pennzoil won an $11 billion jury verdict against Texaco for tortiously inducing a third company, Getty Oil, to breach its contract with Pennzoil. Texaco rushed into federal court to seek an injunction against enforcement of the judgment and to challenge the Texas law that would require Texaco to post a $13 billion bond before it could appeal the judgment.

138. *Id.* at 1536 (Stevens, J., concurring).

dressed in *Younger*.[139] He noted that Texaco had not presented its federal statutory and constitutional challenges to a state court, even though there was a pending proceeding in which those claims could have been raised.[140] Powell argued that the federal court should have deferred to the state proceeding because the state should have the first opportunity to resolve state and federal issues.[141] Because *Pennzoil* challenged the enforceability of a state court judgment, Powell found that the case involved a state interest that the *Younger* abstention doctrine and post-*Younger* cases were designed to protect: the administration of the state's judicial system.[142]

In *Pennzoil*, as in *Dayton Christian Schools*, Justices Brennan, Marshall, Blackmun, and Stevens concurred in the judgment. Although each wrote a separate opinion, all four concurring Justices disagreed with the Powell majority's *Younger* abstention analysis.[143] Stevens argued that, for *Younger* to apply, the state must have a *substantive* interest in the ongoing proceedings.[144] Next, Stevens determined that, contrary to Powell's finding, the state proceedings did not involve an important state interest, noting that the only interest Texas had in the dispute was to provide a forum.[145] Stevens accused the majority of "cut[ting] the *Younger* doctrine adrift from its original doctrinal moorings which dealt

139. *Id.* at 1528.

140. *Id.* at 1529. Instead, Texaco commenced a 42 U.S.C. § 1983 action in federal court on the grounds that the appeal bond requirement, as applied, was state action in violation of Texaco's due process rights.

Justice Brennan, joined by Marshall, was disturbed by the majority's assumption that Texaco's § 1983 action must first be brought in state court. Brennan contended that "[t]his 'blind deference to "States' Rights" ' hardly shows 'sensitivity to the legitimate interests of *both* State and *National* Governments.' " *Id.* at 1531 (Brennan, J., concurring in judgment) (quoting Younger v. Harris, 401 U.S. at 44).

141. *Pennzoil*, 107 S. Ct. at 1526-27.

142. Powell argued that the federal court, by interfering in the ongoing state proceeding, violated principles of comity and federalism that interlace the system of state and national governments. *See generally* cases cited *supra* note 129.

143. Powell wrote the majority opinion, with Rehnquist, White, O'Connor, and Scalia joining. Scalia, joined by O'Connor, concurred separately. Marshall filed his own concurrence, and joined in separate opinions by Brennan and Stevens. Blackmun also concurred separately. The differences among the four justices who concurred in the *Pennzoil* judgment, but not in the rationale, did not involve the applicability of *Younger*. Even though the four agreed that the federal court need not abstain based on *Younger*, two would have precluded the federal court from hearing the case for other reasons. Justice Marshall believed the district court did not have jurisdiction to hear the case. *Pennzoil*, 107 S. Ct. at 1532 (Marshall, J., concurring in judgment). Justice Blackmun believed that the district court should have abstained based on the *Pullman* abstention doctrine. *Id.* at 1534 (Blackmun, J., concurring in judgment).

144. *Id.* at 1535 n.2 (Stevens, J., concurring in judgment).

145. *Id.* at 1535 n.2. Justice Brennan, joined by Justice Marshall, also found the state interest in this case to be "negligible." *Id.* at 1530 (Brennan, J., concurring in judgment).

with the states' interest in enforcing their criminal laws, and the federal courts' long-standing reluctance to interfere with such proceedings."[146]

In *Pennzoil*, Powell again promoted his version of federalism, designed to curtail the power of federal courts. Stevens and others protested the majority's disregard for legitimate federal interests and its excessive deference to state sovereignty.

Powell's and Stevens' differing views on federalism were pivotal in the Court's five-to-four splits on federalism issues. Powell tried to restrict the power of federal courts, claiming that to do otherwise would infringe on states' rights. He believed that a federal court should stay its hand when *any* kind of state proceeding exists in which the federal claims can be raised.[147] Stevens, on the other hand, would not restrict federal court review unless a state has a substantive interest in pending state proceedings.

C. The Commerce Clause and the Tenth Amendment

Powell's and Stevens' ideological conflicts on the demands of federalism in the context of the Tenth Amendment and the Commerce Clause mimicked their disagreements over the relationship between federal and state courts in abstention and eleventh amendment cases. In their tenth amendment/commerce clause debates, the two justices held opposing views on the federal government's exercise of power over state government functions.

Justice Rehnquist's majority opinion in *National League of Cities v. Usery*[148] changed the majority approach to tenth amendment issues from one that gave the federal government substantial leeway in legislating for the national welfare to one that heavily weighted states' rights.[149] Justice

146. *Id.* at 1535 (Stevens, J., concurring in judgment). Justice Blackmun also expressed serious concerns about the majority's *Younger* holding. In his concurrence, Blackmun stated that requiring abstention in this case "would expand the *Younger* doctrine to an unprecedented extent and would effectively allow the invocation of *Younger* abstention whenever any state proceeding is ongoing, no matter how attenuated the state's interests are in that proceeding and no matter what abuses the federal plaintiff might be sustaining." *Id.* at 1534 (Blackmun, J., concurring in judgment).

147. *See supra* notes 126-146 and accompanying text.

148. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985). In *National League of Cities*, the Court invalidated 1974 amendments to the Fair Labor Standards Act (FLSA) that made the act applicable to state and local governments. The majority relied on the Tenth Amendment as a limitation on Congress' commerce clause power to guarantee fair wages and labor standards to all United States workers, including employees of state and local governments.

149. Before Justice Rehnquist's majority opinion in *National League of Cities*, the Tenth Amendment was considered a "truism", not an independent limitation on powers granted to the federal government. *See, e.g.*, United States v. Darby, 312 U.S. 100, 124 (1941). In *Na-*

Powell joined the Rehnquist majority's new federalism rationale. The majority interpreted the Tenth Amendment and federalism to protect "traditional" or "essential" state governmental activities from all federal interference.[150] Four justices dissented from Rehnquist's opinion. Justice Brennan's dissent was joined by Justices White and Marshall.[151] Justice Stevens dissented separately, expressing disagreement with the wisdom of the federal legislation but asserting that federalism does not impose a limitation on Congress' power to enact such legislation.[152]

After *National League of Cities*, the fragile majority that established tenth amendment limitations on federal commerce clause power was threatened.[153] By 1983, Justice Brennan had obtained the additional vote he needed to regain the majority on this federalism issue. In *Equal Employment Opportunity Commission v. Wyoming*,[154] the Court upheld the application of the 1974 amendment to the Discrimination in Employment Act of 1967[155] to Wyoming game wardens. Brennan's majority found no tenth amendment violation because the interference with Wyoming's ability to structure its integral operations was insufficient to override Congress' commerce clause power to ameliorate unjustified age discrimination in employment. Brennan distinguished *National League of Cities*, but referred to it as precedent.[156]

Stevens concurred separately to declare *National League of Cities* a "judicial fiat" that should be reversed.[157] He urged the Court to examine the political and historical significance of the Commerce Clause and its

---

tional League of Cities, the majority turned the tables and held that state sovereignty trumps powers granted to Congress to act for the common welfare.

150. *National League of Cities*, 426 U.S. at 845. Justice Blackmun concurred separately, qualifying his understanding of the majority opinion. *Id.* at 856 (Blackmun, J., concurring).

151. *Id.* at 856 (Brennan, J., dissenting). The dissenters accused the majority of using the Tenth Amendment as a countermajoritarian, antidemocratic tool to invalidate federal legislation because the majority justices disagreed with the substantive policy underlying the wage and hour legislation.

152. *Id.* at 880 (Stevens, J., dissenting). Stevens' dissent is vaguely reminiscent of Justice Holmes' dissent in Lochner v. New York, 198 U.S. 45, 76 (1905), in which Holmes expressed doubts about the wisdom of legislation setting maximum working hours but emphasized that the Constitution neither enacts an economic theory, nor confers power on justices of the Supreme Court to do so.

153. The first success by the *National League of Cities* dissenters was in Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982), in which the Court acknowledged Congress' power to enact the Public Utility Regulatory Policies Act of 1978 (PURPA) and to dictate some policies for state public utility commissions.

154. 460 U.S. 226 (1983).

155. 29 U.S.C. § 621 (1967). The 1974 amendment, like the 1974 amendment to FLSA at issue in *National League of Cities*, made the nondiscrimination provisions of the Employment Act of 1967 applicable to state and local governments.

156. E.E.O.C. v. Wyoming, 460 U.S. at 243.

157. *Id.* at 248-49 (Stevens, J., concurring).

relationship to the establishment of a national union.[158] According to Justice Stevens' historical analysis, the Framers of the Constitution intended the federal government to have unlimited commerce clause power. He argued that the Framers were primarily concerned with eliminating trade barriers and creating a national economy.[159] Stevens concluded that for Congress to create a truly national market, it needed power to regulate both private and public sectors.[160] As he had in *National League of Cities,* Stevens voiced his personal dislike for minimum-wage legislation and prohibitions against mandatory retirement, but emphasized that it is not within a justice's role to pass on the wisdom of legislation.[161]

Powell, in addition to joining Chief Justice Burger's dissent, dissented separately to debate Stevens on federalism.[162] He ridiculed Stevens' "novel view of our national history",[163] stressing that the Framers' central concern was not the elimination of trade barriers among the states but the formation of a federal system with a tripartite national government of limited powers, preserving a significant measure of sovereign authority for the states.[164] Powell offered an elaborate analysis of the language and history of the Constitution and the Bill of Rights to justify his conclusion that federalism concerns dictated both the structure of the Constitution and the ratification of the Tenth Amendment. He argued that the debates surrounding the adoption of the Constitution, the Bill of Rights, and the early decisions of the Supreme Court all supported his argument.[165] The Framers intended the Tenth Amendment as a limitation on all the powers of Congress, Powell explained, including those arising from the Commerce Clause.[166] He contended not only that Stevens' analysis was historically unsound, but also that Stevens failed to consider the role of federalism and state sovereignty in our governmental structure.[167] Powell feared that Stevens' views would permit the federal government to invoke its commerce clause power to preempt almost any state function or law.[168] Perhaps Powell's sense that *National League of*

158. *Id.* at 248.
159. *Id.* at 244-45.
160. *Id.* at 250-51.
161. *Id.* at 250.
162. *Id.* at 265 (Powell, J., dissenting).
163. *Id.*
164. *Id.* at 268-69.
165. *Id.* at 269.
166. *Id.* at 275.
167. *Id.*
168. *Id.*

Cities was in jeopardy of being overruled and his awareness of the need to provide ammunition for its defense prompted his forceful response.

The Court chose *Garcia v. San Antonio Metropolitan Transit Authority*[169] as the vehicle for overruling *National League of Cities*.[170] Stevens joined Blackmun's five-member majority,[171] which reinvested Congress with its commerce clause power to enforce minimum-wage and overtime provisions of the Fair Labor Standards Act against the states. Justice Blackmun, apparently persuaded by Justices Brennan's and Stevens' arguments, rejected distinctions based on governmental, proprietary, essential, or traditional government functions as a method for discerning the requirements of federalism.[172] Blackmun found no reason to define affirmative limits on the exercise of congressional power under the Commerce Clause.[173] Instead, he explained, congressional power can be appropriately circumscribed by the internal safeguards of political processes, which call for state participation in federal government action.[174]

Justice Powell, in a scathing dissent joined by Chief Justice Burger and Justices Rehnquist and O'Connor, accused the Court of "reject[ing] almost 200 years of the understanding of the constitutional status of federalism."[175] He supported this contention by elaborating on the historical analysis from his *E.E.O.C. v. Wyoming* dissent. Powell emphasized that the limitation on federal government interference with state functions is a "matter of constitutional law, not of legislative grace."[176] He rejected the majority's conclusion that political processes enforce federalism limitations, asserting that the protection of constitutional rights, such as those rights reserved for the states by the Tenth Amendment,

169. 469 U.S. 528 (1985).

170. In a terse separate dissent, Justice Rehnquist forecast a short life for *Garcia's* majority opinion and a return to the federalism principles he voiced in *National League of Cities*. *See supra* text accompanying note 150. Rehnquist expressed confidence that his interpretation of the demands of federalism would "in time again command the support of a majority of this Court." *Garcia*, 469 U.S. at 579-80 (Rehnquist, J., dissenting).

171. Blackmun provided the fifth majority vote in *National League of Cities*. By changing sides, he also provided the fifth vote in *Garcia*. *See supra* notes 148-150 and accompanying text.

172. *Garcia*, 469 U.S. at 545-57.

173. *Id.* at 556.

174. *Id.* at 552.

175. *Id.* at 560 (Powell, J., dissenting). Powell's dissent in *Garcia* is similar in tone and style to Stevens' dissent in *Pennhurst II*, written a year earlier, in which Stevens accused Powell of rejecting a century of eleventh amendment jurisprudence. *See supra* text accompanying notes 93-94.

176. *Garcia*, 469 U.S. at 567 (Powell, J., dissenting).

cannot be left solely to political processes.[177] First, Powell argued that historically the judiciary was charged with preventing congressional overreaching.[178] Second, he disputed the majority's understanding of democratic processes and the functioning of federal government.[179] Powell noted in particular the majority's misunderstanding of how legislation is drafted:[180] bills are rarely the product of local initiatives, rather they are generated by federal civil servants and staff who have little knowledge of the localities that will be affected.[181] Powell argued that the majority's ostensible goal, to reinforce self-government and the democratic process, would be more effectively accomplished at local and state levels than at the federal level.[182] Powell concluded that extension of age-discrimination proscriptions to states' employment procedures failed the Tenth Amendment's balancing test,[183] which weighs states' rights and federalism interests against the potential impact of applying a particular federal law to the states.[184]

Powell's resignation should not affect the dynamics of the Court's debate on tenth amendment federalism issues because he was firmly entrenched in Chief Justice Rehnquist's minority camp.

Powell and Stevens expressed their distinct views of federalism during the Court's recent re-engagement with the Tenth Amendment. As with their differences over separation of powers, the Eleventh Amendment, and abstention doctrine, their tenth amendment debates often took a personal tone. On federalism issues they regularly fell into the same opposing factions. Powell was consistently aligned with conservative Justices Burger, Rehnquist, White, and O'Connor, while Stevens teamed up with liberal Justices Brennan, Marshall, and Blackmun. Powell and Stevens were far from "centrists" in the tenth amendment area.

D. Preemption and the Supremacy Clause

Preemption and the Supremacy Clause raise many of the same federalism concerns that the Tenth Amendment raises. In preemption cases courts must decide whether an activity requires federal uniformity or can survive simultaneous regulation by federal and state governments, whether the federal and state laws on the question conflict or are compat-

177. *Id.* at 566-67.
178. *Id.* at 567 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).
179. *Id.* at 574-77.
180. *Id.* at 576.
181. *Id.* at 576-77.
182. *Id.* at 576.
183. *Id.* at 578-79.
184. *Id.* at 563 n.5, *see supra* note 170.

ible, whether federal law occupies the field, and, most importantly, whether Congress intended to preempt state laws on a particular subject.[185] Stevens' and Powell's positions are not as clearly opposing on questions of preemption as they are on other federalism issues.[186] In cases dealing with antitrust law, business law, and labor law preemption, however, the two justices have debated in their usual fashion.

1. Antitrust and Business Law

In antitrust and business law, Stevens and Powell often disagreed about whether federal law preempted state regulation. Their federalism debates in the antitrust area centered around the judicially created state action antitrust liability exemption announced in *Parker v. Brown*.[187] The Court designed the *Parker* exemption to mediate conflicts between federal antitrust laws and state power to regulate certain intrastate economic activities.[188] The exemption applies only to anticompetitive regu-

185. *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549 (1987); California Fed. Sav. and Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987); Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355 (1986); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963).

186. In several cases, Powell and Stevens agreed on preemption issues. *See, e.g.*, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (Powell, J., dissenting, Stevens, J., joining) (Stevens and Powell agreeing that California's environmental regulations were in conflict with, and hence preempted by, federal Forest Service regulations); International Paper Co. v. Ouellette, 107 S. Ct. 851 (1987) (agreeing that federal Clean Water Act preempted state resident's common law nuisance actions against polluters from same state, but differing over which other issues should be addressed); Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549 (1987) (agreeing ERISA preempts state common law contract and tort actions); Offshore Logistics, Inc. v. Tallentine, 470 U.S. 816 (1986) (Powell, J., dissenting, Stevens, J., joining) (agreeing that Death on the High Seas Act did not preempt state wrongful death remedies for nonpecuniary losses); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (agreeing that Nonintercourse Act of 1793 preempted later dealings between Native Americans and County regarding sales of land, but differing on effects of delay in bringing suit); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) (Powell, J., and Stevens, J., dissenting separately) (agreeing that Natural Gas Act "filed rate doctrine" did not preempt state damages actions); Ridgway v. Ridgway, 454 U.S. 46 (1981) (Powell, J., and Stevens, J., dissenting separately) (agreeing that beneficiary provisions of Servicemen's Group Life Insurance Act of 1965 did not preempt state divorce decree providing for serviceman's children); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (agreeing that federal law preempted Arizona's power to impose taxes on motor carrier licenses and fuel usage for timber operations on reservation); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), *modified*, 444 U.S. 816 (agreeing that federal interpretation of Indian treaty governing entitlement to anadromous fish would prevail over state supreme court interpretation of treaty); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (agreeing that federal Ports and Waterways Safety Act of 1972 preempted Washington State's tanker law).

187. 317 U.S. 341 (1943).

188. *Id.*

latory activities expressly directed and actively supervised by the state.[189] In several cases in which Powell encouraged state regulation and sovereignty through extension of the state action exemption, Stevens argued for federal preemption of state laws. Their positions in the antitrust area correspond with their differing views of federalism, and in particular with Stevens' belief that national federalism grew out of a need for a national market.[190]

In *Cantor v. Detroit Edison Co.*,[191] the Court permitted a treble damage award against an electric utility for tying[192] light bulb sales to the sale of electricity, even though a state regulatory agency had approved the practice as part of the electric company's rate structure.[193] Stevens, writing for the majority, argued that since there was no conflict between federal antitrust laws and state regulations, the two could coexist.[194] Even if a conflict between federal and state laws exists, Stevens contended that federal interests need not always be subordinate to state regulation.[195] Powell joined Justice Stewart's dissent, which argued that Congress intended to exempt state regulation, including regulation of state public utilities, from the Sherman Antitrust Act.[196]

In *Hoover v. Ronwin*,[197] the Powell majority held that state bar examiners were immune from plaintiff's antitrust challenges to state bar

189. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

190. *See* E.E.O.C. v Wyoming, 460 U.S. 226, 248 (1983) (Stevens, J., concurring); *see also supra* text accompanying notes 158-160.

191. 428 U.S. 579 (1976).

192. "Tying" is the anticompetitive practice of requiring a purchaser who wishes to buy a first item over which the seller has monopoly power also to buy a second item.

193. *Cantor*, 428 U.S. at 585. The state agreed to the tying arrangement in the utility's tariff application, but did not require it.

194. *Id.* at 595.

195. *Id.* at 596. Stevens advocated a limited interpretation of the *Parker* exemption. Less than a majority of the Court concurred with Stevens on the proposition that only state officials, and not private businesses, should enjoy *Parker* immunity.

196. *Id.* at 614 (Stewart, J., dissenting). Powell's position in these antitrust cases, in which he argued to extend the protections of the state action immunity doctrine to private businesses, contrasts with his decision in Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, *reh'g denied*, 460 U.S. 1105 (1983), in which he refused to imply a state exemption from the Robinson-Patman anti-price-discrimination law for state hospital pharmacies.

197. 466 U.S. 558 (1984). The plaintiff in *Hoover*, an unsuccessful bar applicant, sued the Arizona State Bar Examiners, claiming that their grading practices were not designed to assure that applicants demonstrated a certain level of competence, but were designed to maintain a monopoly by limiting the number of new lawyers entering state practice. The bar examiners argued that, because they were appointed by the state supreme court and acted according to rules of that court, they stood in the shoes of the state and were entitled to the state action exemption.

admissions practices.[198] Contrary to Stevens' dissent,[199] Powell did not find it decisive that the plaintiff did not name the state supreme court as a party.[200] Powell reasoned that since only the Arizona Supreme Court had authority to grant or deny admission to practice law in the state, any bar admission decisions must be viewed as regulatory decisions of the state.[201] Powell predicted that Stevens' approach would lead to a regime in which Sherman Act plaintiffs could look behind the actions of state sovereigns and base their claims on perceived conspiracies in restraint of trade among committees, commissions, and others that merely advise the sovereign.[202] Powell based his judgment on respect for state sovereignty, a core federalism concern.

Stevens rejected the notion that *Hoover* was a suit against the state.[203] He acknowledged that the state delegated power to the bar examiners to set standards for market entry, but noted that there was no claim that the state court ordered the bar examiners to reduce the number of lawyers.[204] Because the state had not directed the bar examiners' actions, the bar examiners could not enjoy the state's immunity.[205] If the examiners abused the power vested in them, Stevens continued, they should not be able to partake of the state's immunity.[206] He concluded that a healthy respect for state regulatory policy does not require antitrust immunity for those who abuse the public trust.[207]

Powell reiterated his position that federal antitrust laws must bend to state regulation in *Southern Motor Carriers Rate Conference v. United States*.[208] Advocating his usual states' rights position, Powell argued that private parties acting pursuant to a state regulatory policy that *permits* anticompetitive conduct are exempt from federal antitrust law, just as

198. *Id.* at 573.

199. *Id.* at 582 (Stevens, J., dissenting).

200. *Id.* at 573-75.

201. *Id.* at 573, 580.

202. *Id.* at 580.

203. *Id.* at 587-92. (Stevens, J., dissenting).

204. Analogizing the bar examiners to a fourteenth-century London bakers' guild with control over market entry, prices, and output, Stevens saw potential abuse of power when the designated regulatory authority over market entry is a private party with a stake in the competitive conditions of the market. *Id.* at 582-84.

205. *Id.* at 586.

206. This argument is similar to Steven's dissent in *Pennhurst II* in which he argued that state officers who violate state laws could not partake of the state's eleventh amendment sovereign immunity. *See supra* notes 90-93 and accompanying text.

207. *Hoover*, 466 U.S. at 601 (Stevens, J., dissenting).

208. 471 U.S. 48 (1985). In *Southern Motor Carriers*, state public service commissions permitted, but did not require, motor carrier rate bureaus to submit collective rate proposals. When this practice was challenged as violative of antitrust laws, the private rate bureau argued for an implied immunity from antitrust liability based on the *Parker* state action exemption.

private parties that are *compelled* by state anticompetition regulations are exempt.[209] According to Powell, the goal of the state action exemption is to respect federalism and to permit the states some latitude in their regulatory policies.

Stevens heartily disagreed.[210] His dissent, like his majority opinion in *Cantor*,[211] stressed that when Congress does not create an immunity, it does not intend one to apply.[212] He maintained that private parties should not be permitted to participate in the state's immunity unless the state compels their activity.[213] Thus, Stevens' view in *Southern Motor Carriers* was more moderate than the view he articulated in *Cantor*, where he would have denied all private parties use of the state action exemption absent great state interference in the private party's action. Stevens identified a distinction between a state regulation *requiring* certain behavior and a state regulation *permitting* the same behavior.[214] He contended that no conflict between antitrust laws and federalism concerns exists when a state merely permits anticompetitive behavior. Stevens then chastised the majority for its misplaced reliance on federalism rhetoric.

Powell's and Stevens' debates over application of the state action exemption in antitrust suits echo their debates about federalism in other contexts. Powell's rhetoric reflects his preference for state sovereignty, with minimal federal interference.[215] Stevens' dissents advocate adherence to the competitive ideal of the Sherman Act and national markets.

209. *Id.* at 61-62.

210. *Id.* at 66 (Stevens, J., dissenting).

211. *See supra* notes 191-195 and accompanying text.

212. Stevens argued that congressional silence indicates that Congress intended that no immunity was to be created. This reasoning is parallel to Powell's in *Cannon* and *Merrill Lynch*, *see supra* notes 21-29, 37-42 and accompanying text, although Stevens disagreed with Powell in those cases.

213. *Southern Motor Carriers*, 471 U.S. at 71 (Stevens, J., dissenting).

214. In particular, Stevens argued that the exemption protects private parties from liability for anticompetitive behavior if the state requires that behavior in order to make its regulatory scheme work. If the state does not compel or require the behavior, then application of the exemption would go beyond the purpose of the exemption. *Id.* at 74-75.

215. In his final case involving the application of the *Parker* exemption, Powell wrote the Court's majority opinion denying the exemption to the New York State Liquor Authority. 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987). *Duffy* was about per se violations of antitrust laws and state exemptions, an issue that traditionally found Stevens and Powell on opposing sides. In *Duffy*, however, both determined that the resale price maintenance scheme was a per se violation of the Sherman Act. Powell generally argued that per se rules should yield to the "rule of reason" test, and accused Stevens' majority opinions of too much rigidity in their application of per se rules. *See, e.g.*, Jefferson Parish Hosp. Dist. Number 2 v. Hyde, 446 U.S. 2 (1984) (O'Connor, J., dissenting, Powell, J., joining); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (Powell, J., dissenting). When Stevens applied a "rule of reason" test, Powell joined his reasoning. National Collegiate Athletic Ass'n v. Board of Regents of

2. *Business Law*

Stevens and Powell occupy their usual opposing positions in the area of business law. In *CTS Corp. v. Dynamics Corp. of America*,[216] the Court, with Powell writing for the majority, held that an Indiana statute regulating tender offers was not preempted by the Williams Act[217] and that the state statute constituted too limited an intrusion upon interstate commerce to violate the Commerce Clause.[218]

Stevens joined White's dissent, which found that the state tender offer law violated the Commerce Clause because it directly regulated the sale and purchase of stock in interstate commerce.[219] However, White's dissent agreed with Powell that the Williams Act did not preempt the Illinois law.[220] Stevens did not join that part of White's dissent, again expressing his preference for national markets over Powell's intense protection of state sovereignty.[221]

Powell favored giving states the utmost latitude by finding exemptions from antitrust liability, or by declaring that the Commerce Clause and federal laws do not preempt states' capacities to regulate markets. Stevens preferred to give the national government maximum authority to regulate commerce by permitting antitrust liability for state-related anticompetitive activities, and by finding that state laws regulating business transactions violate the Commerce Clause if they unduly burden interstate commerce.

3. *Labor Law*

Contrary to the positions they took in other preemption cases, in labor cases, Powell argued for federal preemption of state labor laws, while Stevens promoted upholding state labor laws as compatible with national labor law. In several labor law cases, unlike separation of powers, eleventh amendment, tenth amendment, and abstention cases, Pow-

---

University of Oklahoma, 468 U.S. 85 (1984). In *Duffy*, they both agreed that a per se rule was appropriate.

Because of his antitrust expertise, *see supra* note 1, Stevens was usually the spokesperson for the majority in antitrust cases. He authored the majority opinion in all the cases cited in this note. Therefore, it is unusual that in *Duffy*, Powell wrote the majority opinion when Stevens was a member of the majority.

216. 107 S. Ct. 1637 (1987).

217. 15 U.S.C. § 78m-n (1968), *amended by* 15 U.S.C. §§ 78m(d)-(e) and 78n(d)-(f) (1982 & Supp. III 1985).

218. *CTS Corp.*, 107 S. Ct. at 1648.

219. *Id.* at 1655-56 (White, J., dissenting).

220. *Id.*

221. *Id.* at 1653. Stevens only joined in Part II of White's dissent.

ell aligned himself with Justice Brennan, and Stevens teamed up with Justice Rehnquist.

Powell concurred with the Brennan majority opinion in *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*,[222] which held that federal labor law preempted a Wisconsin law that made a union's refusal to work overtime[223] an unfair labor practice. To reach this conclusion, the majority had to overrule the *Briggs-Stratton* doctrine,[224] which declared that the National Labor Relations Act (NLRA)[225] did not preempt state power to regulate partial strikes.[226] In his separate concurrence, Powell agreed that the *Briggs-Stratton* doctrine should be overruled, but argued that the preemptive effect of a federal labor law depends on whether the state law interferes with the balance that the NLRA established between management and labor.[227] He argued that the Wisconsin law curtailed the union's self-help capability and resulted in a significant shift in the balance of free economic bargaining.[228] Therefore, he concluded, federal labor law preempted the Wisconsin law.[229]

Stevens wrote a dissent specifically disagreeing with Powell's concurrence.[230] He interpreted congressional silence on the issue of partial strikes as an invitation for state regulation.[231] According to Stevens, the Court could not claim to implement congressional intent when Congress had neither spoken on the issue of partial strikes nor legislatively overruled the *Briggs-Stratton* doctrine.[232] He was not persuaded by Powell's argument that regulation of partial strikes disrupts the balance of power between employer and employee.[233]

---

222. 427 U.S. 132, 155 (1976) (Powell, J., concurring).

223. In labor law, a refusal to work overtime is also known as a partial strike.

224. The *Briggs-Stratton* doctrine originated in the 1949 case of Automobile Workers v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949).

225. 29 U.S.C. § 151-169 (1935).

226. *Lodge 76*, 427 U.S. at 151.

227. *Id.* at 155-56 (Powell, J., concurring).

228. *Id.* at 156. Powell noted that if the state law had only an incidental effect on bargaining position and reflected a neutral policy, the law would not be preempted.

229. *Id.*

230. *Id.* at 156 (Stevens, J., dissenting).

231. *Id.* at 158.

232. *Id.* at 159.

233. *Id.* at 158-59. Stevens also objected to the majority's willingness to discard the quarter-century-old *Briggs-Stratton* rule. See *supra* note 117 and accompanying text for a discussion of Stevens' and Powell's use and rejection of stare decisis. Stevens predicted that labor-management relations would be disrupted more by the abolishment of the *Briggs-Stratton* rule than by state regulation of partial strikes. *Id.* at 159.

Powell's advocacy of federal preemption of state labor laws led him to dissent from Stevens' plurality opinion in *New York Telephone Co. v. New York State Department of Labor*.[234] Stevens found that Congress had been silent about whether states could enact unemployment compensation statutes that paid benefits to strikers. Consistent with his decision in *Lodge 76*, Stevens refused to interpret congressional silence as evidence of congressional intent to preempt or prohibit specific state labor law provisions.[235] Powell, on the other hand, found that state law was preempted because granting unemployment compensation benefits to strikers upset the bargaining balance.[236]

In *Belknap v. Hale*,[237] Stevens predictably joined the majority decision, which held that federal labor law did not preempt a breach of contract action under state law by replacement workers against employers. Powell joined Brennan's dissent, contending that federal law preempted the state suits and prevented replacement workers from suing for breach of contract when they were terminated and strikers rehired in their place.[238] Powell believed that suits for breach of contract affected the bargaining balance. Thus, according to his reasoning in *Lodge 76*, such suits should be preempted by federal law.[239]

Sears, Roebuck and Co. v. San Diego County District Council of Carpenters[240] is not in alignment with other cases in the Powell-Stevens labor law debate. Stevens' majority opinion in *Sears* reflected his familiar position that federal labor law does not preempt state laws.[241] Powell, surprisingly, concurred, concluding that the NLRA[242] does not preempt state trespass laws and that picketers could therefore be enjoined from

234. 440 U.S. 519 (1979).

235. *Id.* at 540, 561. Note the contradictions of Stevens' argument regarding congressional silence in *New York Telephone* with his arguments in the antitrust state immunity cases. *See supra* text accompanying notes 187-214. Stevens argued that congressional silence empowers states to act in labor cases, but disempowers states in antitrust cases.

The difficulty in reconciling Stevens' arguments on congressional silence results from his inconsistent framing of the issues. If Congress does not positively create a state exemption from liability in the antitrust context, Stevens considers the silence evidence of congressional intent for no exemption. *See supra* note 212 and accompanying text. The lack of prohibition in labor and implied rights of action cases, however, is, according to Stevens, an open door for action by states or federal courts. *See supra* notes 231 & 235 and accompanying text. Thus, Stevens reached different results based on whether he framed congressional silence as the "absence of a prohibition" or the "absence of a positive act of creation."

236. *New York Telephone*, 440 U.S. at 567 (Powell, J., dissenting).

237. 463 U.S. 491 (1983).

238. *Id.* at 523, 530 (Brennan, J., dissenting, Powell, J., and Marshall, J., joining).

239. *Id.* at 524.

240. 436 U.S. 180 (1978).

241. *Id.* at 198.

242. 29 U.S.C. §§ 151-69 (1935).

continuing to trespass.[243] Powell reasoned that a dispute about whether picketers are trespassing on an employer's premises is not the type of conflict that can be timely resolved by the National Labor Relations Board, and therefore state laws were not preempted.[244]

Except for a digression in *Sears*, Powell shifted from the steadfast state sovereignty position he maintained in business, antitrust, tenth amendment, eleventh amendment, and abstention cases to a position advocating a unitary, national approach of federal preemption in the labor law area. Stevens, on the other hand, a strong champion of a national market and federal dominance in antitrust, commerce, tenth amendment, eleventh amendment, and implied remedies cases, rejected federal predominance in cases involving issues of labor-management relations.[245] The startling difference between Powell's and Stevens' positions in labor law cases and their positions in other cases may reflect their perception of hidden biases in federal labor law. No clear patterns emerge even when their opinions are examined from promanagement or prolabor political perspectives.[246] The labor law preemption opinions stand out as anomalies among Powell's and Stevens' debates about the appropriate balance between state and federal governments.

Conclusion

During the last decade, a battle raged between Justices Powell and Stevens, the Supreme Court's so-called "centrists",[247] on issues fundamental to the constitutional balance of power. Far from being centrist on issues involving the structure of government, Powell and Stevens had strongly opposing views. They vigorously disagreed with one another about the proper allocation of power between Congress and the federal courts[248] and between state and federal government.[249] Their debates on

243. *Sears, Roebuck and Co.*, 436 U.S. at 212-14 (Powell, J., concurring). Powell was particularly concerned about the inadequacy of federal labor law to remedy the creation of a temporary easement on the employer's property.

244. *Id.* at 213.

245. For a related case involving issues of preemption and employment law, but not federal labor law, see California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987). In *Guerra*, Stevens and Powell are again on opposite sides of a preemption issue, and in the unusual posture that is characteristic of their labor decisions. Powell supported federal law preemption instead of state sovereignty, and Stevens supported state law despite a clear national scheme.

246. For example, Stevens' opinions aided union workers in *New York Telephone*, but aided management in *Lodge 76*, *Sears*, and *Belknap*. Powell favored labor in *Lodge 76* and *Belknap*, but not in *Sears* or *New York Telephone*.

247. *See supra* note 2 and accompanying text.

248. *See supra* notes 6-67 and accompanying text.

249. *See supra* notes 68-221 and accompanying text.

the nature and requirements of federalism, its constitutional and historical underpinnings, and its continuing force saturate their opinions. The Court's two factions often designated Powell and Stevens to present their conflicting views on implying private damages actions from federal statutes, abstention, the Tenth and Eleventh Amendments, and preemption. Their polemics occasionally rose to bitter levels, textual attacks, and assaultive footnotes. At other times, in softened tones, they doggedly persisted in articulating their independent visions.

This concentrated study of their interactions allows the reader to see the Supreme Court from a new perspective. Powell and Stevens no longer appear to be centrists; rather they are fixed at opposite ends of the debates, and Court doctrine develops in response to their interactions. The Powell-Stevens debates created much of the law governing the implication of private damages actions under federal statutes[250] and the Constitution,[251] the separation of powers between Congress and the courts,[252] eleventh amendment doctrine,[253] tenth amendment doctrine,[254] preemption,[255] and abstention.[256] Powell was a steadfast advocate of state sovereignty and minimal federal interference in state activities in cases that he characterized as involving federalism issues. He sought to restrain federal courts in relation to Congress and state courts. Stevens' brand of federalism recognized that national unity is primary. Stevens would also give the courts more power than Powell would allow them. For over a decade the two justices struggled over these contrasting visions of government structure. Powell's and Stevens' opposing views paralleled the differences between the Court's conservative and liberal factions.

Supreme Court jurisprudence is multifaceted. Therefore, it is valuable to step back from the dominant modes of analysis and regard the dynamics of the Court from new perspectives. Scholars should examine the relationships among justices and how their interpersonal, ideological battles affect the development of the law. This Article examines debates between Justices Powell and Stevens, focusing on the effects of their interactions on federalism and separation of powers principles. Relationships between other justices should be studied, perhaps uncovering similar debates affecting constitutional jurisprudence.

250. *See supra* notes 6-42 and accompanying text.

251. *See supra* notes 43-56 and accompanying text.

252. *See supra* notes 57-67 and accompanying text.

253. *See supra* notes 70-125 and accompanying text.

254. *See supra* notes 148-184 and accompanying text.

255. *See supra* notes 185-246 and accompanying text.

256. *See supra* notes 126-147 and accompanying text.

Table I.

MAJORITY VOTES

	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
Powell *	113	108	111	108	106	113	131	137	131	131	129
Powell % **	89.7	83.7	85.4	81.8	86.9	80.1	86.8	90.7	94.2	89.7	89.0
Stevens *	97	99	103	99	90	109	104	98	98	92	92
Stevens % **	77.0	76.7	79.2	75.0	73.8	77.3	68.9	64.9	70.5	63.0	63.5

* Number of cases each term in which this justice was part of the majority.
** Percentage of total Court cases each term in which this justice agreed with the majority.

Table II.

DISSENTING VOTES

	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
Powell *	13	21	19	24	16	28	20	14	8	15	16
Powell % **	10.3	16.3	14.6	18.2	13.1	19.9	13.2	9.3	5.8	10.3	11
Stevens *	29	30	27	33	32	32	47	53	41	54	53
Stevens % **	23.0	23.3	20.8	25.0	26.2	22.7	31.1	35.1	29.5	37.0	36.5

* Number of cases in which this justice cast a dissenting vote each term.
** Percentage of total Court cases in which this justice was in dissent each term.