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State Sovereignty—A Polished But Slippery Crown

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During the past decade, the Supreme Court has decided two notable cases[1] which have had, it is certain, the effect of greatly enhancing both the theoretical and the practical significance of the tenth[2] and eleventh[3] amendment-based concept of "state sovereignty." As a consequence, there has been an acceptance, at least in the "conventional wisdom,"[4] of the proposition that the star of "state sovereignty"—long dulled since Mr. Justice Stone's famous remark in *United States v. Darby*[5]—is now on a steadily ascending course at the hands of a Court clearly concerned about restoring a sense of balance in "Our Federalism."[6] Analysis—and prognostication—in the development of constitutional doctrine are, however, never that comfortable. As Justice Frankfurter wrote, in an essay[7] originally written before his ascendancy to the Supreme Bench[8] and revised after over a decade as a sitting Justice, "[a] rhythm, even though not reducible to law, is manifest in the history of Supreme Court adjudication. Manifold and largely undiscerned factors determine general tendencies at the Court, much too simpli-

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1 National League of Cities v. Usery, 426 U.S. 833 (1976); Edelman v. Jordan, 415 U.S. 651 (1973).

The majority opinion in *Edelman* was written by Justice Rehnquist. He was joined by the Chief Justice and Justices Stewart, White and Powell. Dissenting opinions were filed by Justices Douglas, Brennan and Marshall. Justice Blackmun joined the opinion of Justice Marshall.

Justice Rehnquist also wrote for the majority in *National League of Cities* and was joined by the Chief Justice and Justices Stewart, Blackmun and Powell. Two dissenting opinions were filed—one by Justice Brennan, in which Justices White and Marshall joined—the other by Justice Stevens.

2 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

3 "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." U.S. CONST. amend. XI.

4 *See* J. GALBRAITH, THE AFFLUENT SOCIETY 9 (1958).

5 "The [tenth] amendment states but a truism that all is retained which has not been surrendered" United States v. Darby, 312 U.S. 100, 124 (1941).

Darby itself did not, of course, directly present a situation where the commerce power had been used to directly affect "integral state functions" as that term is used in *National League of Cities*. Rather, it involved a limitation on the police power of the state. *Darby* did, however, dull the vitality of the tenth amendment in all respects including its ability to identify the states as distinct governmental entities in our federal system, *i.e.*, as "sovereigns." *See* Fry v. United States, 421 U.S. 547, n.7 (1975).

6 *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

7 Frankfurter, *The Supreme Court* reprinted *in*, P. KURLAND, FELIX FRANKFURTER ON THE SUPREME COURT: EXTRA JUDICIAL ESSAY ON THE COURT AND THE CONSTITUTION 448 (1970). The original version was published in 1934 in the *Encyclopedia of Social Sciences*. The latter version was prepared for publication in the Hansard Society's *Aspects of American Government* (1950).

8 Mr. Justice Frankfurter took his seat in January, 1939.

fied by phrases like 'the centralization' of Marshall or 'the states rights' of Taney."[9] Moreover, it is a basic trait of American constitutional development that any shift in ideological perspective—and especially a cross-doctrinal shift—carries within it the seeds of its own limitations. Indeed, these modern cases,[10] manifesting a concern with the position of the state government within the federal system, began their jurisprudential lives with a particular susceptibility to such limitation. Forged on the barest of majorities, they were subject, from the beginning, to the strongest of dissent.[11]

The purpose of this article is not to announce the end of this rejuvenation of state sovereignty in our federal structure.[12] Rather, in the pages which follow, we shall attempt to isolate, from the recent work of the Court, what appear to be significant indications—some of them seminal—that the trajectory of the star of "state sovereignty" will soon encounter as many centripetal as centrifugal forces and that the resultant doctrinal orbit may be a little less spectacular than the "conventional wisdom" had predicted.

I.

As a predicate to this analytical survey, it is appropriate to set forth, at least briefly,[13] two key cases which are the cornerstones for the present Court's renewed interest in the concept of state sovereignty—*National League of Cities v. Usery* and *Edelman v. Jordan.*

Prior to *National League of Cities,* the Supreme Court of the United States had decided, over the past four decades, a series of cases which, when read together, seemed to establish that the tenth amendment was no barrier to congressional exercise of the Commerce Power. In *United States v. California,*[14] a unanimous Court ruled that provisions of the Safety Appliance Act[15] forbidding interstate rail carriers to haul cars not equipped with automatic impact couplers applied, with equal force, to state-owned railroads.[16] *Maryland v. Wirtz,*[17]

9 *See* Frankfurter, *supra* note 7, at 454.

10 *See* note 1 *supra.*

11 Both *Edelman* and *National League of Cities* were decided on 5-4 votes. For a more complete explanation of the Court's "lineup" see note 1 *supra.*

12 This article will focus on the relationship between state government and federal power. It does not assume, of course, that the matrix of federal-state relations is entirely dependent on issues of state governmental sovereignty. *See, e.g.,* Elkins v. Moreno, 435 U.S. 647 (1978); Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978). Nor will the question of interstate relations be addressed. *See, e.g.,* Nevada v. Hall, 47 U.S.L.W. 4261 (1979); Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978); Hicklin v. Orbeck, 435 U.S. 902 (1978).

13 For more complete treatments of *Edelman* and *National League of Cities, see, e.g., Barber,* National League of Cities v. Usery: *New Meaning for the Tenth Amendment,* 1976 SUPREME COURT REVIEW 161; *The Supreme Court, 1973 Term,* 88 HARV. L. REV. 43, 243 (1974).

14 297 U.S. 175 (1936).

15 Safety Appliance Act of 1893 § 2, 45 U.S.C. § 2 (1893).

16 The Court curtly rejected California's assertion that statehood itself served to bar the operation of the Safety Appliance Act. Distinguishing the scope of limitations imposed on the exercise of the federal taxing power from those limitations attendant to the exercise of the Commerce Clause, the Court stated:

> Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

297 U.S. at 185.

17 392 U.S. 183 (1968).

decided some thirty years after *United States v. California,*[18] rejected the state's contention that principles of state sovereignty could be interposed affirmatively to prevent the otherwise valid exercise of the Commerce Power and consequently upheld amendments to the Fair Labor Standards Act that applied directly to state schools and hospitals.[19] *Fry v. United States*[20] validated provisions of the Economic Stabilization Act of 1970[21] which imposed wage and salary controls on state employees. In each of these cases, remedial federal legislation was sustained under the Commerce Clause, although the challenged statutory provision directly displaced the states *qua* states within the federal system.

In 1974, however, Congress enacted amendments to the Fair Labor Standards Act which, for the first time, applied the minimum wage and maximum hour provision of the Act directly to state and municipal government employees.[22] "The Act . . . [imposed] upon almost all public employment the minimum wage and maximum hour requirements previously restricted to employees [actively] engaged in interstate commerce,"[23] thereby subjecting the states to requirements "essentially identical to those imposed upon private employers."[24] Under the new amendments certain vitally important public employment areas, such as police and fire protection services, were brought within the bounds of federal regulation[25] and, therefore, compensation for overtime pay would be payable in cash rather than with compensatory time off.

Faced with threatened application of these amendments, the *National League of Cities,* together with individual municipal and state governments, filed for declaratory and injunctive relief, alleging, *inter alia,* that the 1974 amend-

18 297 U.S. 175 (1936).

19 Fair Labor Standards Amendments of 1966, § 102, 29 U.S.C. §§ 203(d)(5)(4) (1966). In 1961 Congress expanded the FLSA to bring certain "enterprises" engaged in commerce within the purview of its provisions. The amendment was crucial since it effectively eliminated the direct connection requirements for applicability of the Act. As a consequence, employees of an enterprise engaged in commerce are protected. The Court relied on United States v. Darby, 312 U.S. 100 (1941) and NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937) to sustain the validity of this "enterprise concept." *See* 392 U.S. at 188-93. Then, turning to the states' contention that the exercise of such power constituted an impermissible "interference with 'sovereign state functions' " it concluded: (1) that the "governmental" versus "proprietary" distinction between state activity was immaterial to the proper resolution of a Commerce Clause case; (2) that the principle of United States v. California, 297 U.S. 175 (1936), was controlling and (3) that, therefore, the Court would "not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the states for the benefit of their citizens." *See* 392 U.S. at 198-99.

20 421 U.S. 542 (1975).

21 Economic Stabilization Act of 1970, § 202, 12 U.S.C. § 1904 (Supp. 1970). The *Fry* Court reiterated the principle set forth in *Wirtz* "that states are not immune from all federal regulations under the Commerce Clause merely because of their sovereign status." *See* 421 U.S. at 548. It then noted that the Act (1) was limited in application; (2) was an emergency measure promulgated in response to a specific national need and (3) depended, for its effectiveness, on uniform application. In rejecting petitioners' tenth amendment claims, however, Justice Marshall made it clear that the "truism" of *Darby* was, nevertheless, significant. "The [tenth] amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the state's integrity or ability to function effectively in a federal system." *See* 421 U.S. at 547.

22 Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58 (amending 29 U.S.C. § 203 (1970)).

23 426 U.S. at 839.

24 *Id.*

25 National League of Cities v. Brennan, 406 F. Supp. 826, 827 (D.C., 1974).

ments to the FLSA were beyond the power of Congress under the Commerce Clause because, as applied, they would "seriously affect the structuring of state and municipal governmental activities."[26] Instead, the National League urged recognition of an affirmative limitation on the exercise of the Commerce Power which operated when Congress sought "to regulate directly the activities of States as public employers. . . ."[27] The complaint alleged *inter alia,* that, if the amendments were permitted to stand, voluntary community service programs would be placed in immediate jeopardy, and the ability of the affected governmental unit to meet particular exigencies would be vitiated by the forced imposition of work structures inappropriate for a governmental employees' workweek.[28] The district court, "troubled by the contention that the amendments would intrude upon the states' performance of essential governmental functions"[29] but constrained by *Maryland v. Wirtz,*[30] dismissed the complaint while simultaneously sending the Supreme Court the following signal:

> it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Maryland v. Wirtz;* but that is a decision that only the Supreme Court can make, and as a federal district court we feel obliged to apply the Wirtz opinion as it stands.[31]

The Supreme Court did indeed feel it appropriate to "draw back from the far-reaching implications of *Maryland v. Wirtz,*"[32] holding, in *National League of Cities v. Usery,*[33] "that insofar as the challenged amendments operate to directly displace the states' freedom to structure integral governmental functions, they are not within the authority granted by Art. I, § 8, Cl. 3."[34] Justice Blackmun concurred in the Court's opinion in *National League of Cities* only after making it clear that he remained troubled by certain possible implications of the decision itself.[35] The Justice characterized the majority opinion as adopting a balancing approach to tenth amendment analysis. Hence, no automatic displacement of federal power would follow a finding that the exercise of such power reached into areas of traditional state governmental functions. Rather, the importance of the conflicting local interest would be weighed against the asserted federal concern. Justice Blackmun suggested, for example, that federal power to regulate in the interest of environmental protection would not be affected by the limitations of the tenth amendment because a demonstrably greater federal interest would justify the imposition of federal environmental standards directly against the states.

National League of Cities was not, however, a unanimous decision. Dependent on the concurring opinion of Justice Blackmun for its strength, it also faced a strong dissent which recognized only a single course of limitation on fed-

26 *Id.*
27 427 U.S. at 841.
28 Plaintiff's Complaint at 20-21, National League of Cities v. Usery, 426 U.S. 833 (1974).
29 426 U.S. at 839.
30 392 U.S. 183 (1968).
31 406 F. Supp. at 828.
32 392 U.S. 183 (1968).
33 426 U.S. 833 (1976).
34 426 U.S. at 852.
35 *Id.* at 856.

eral commercial power—the ballot. While the majority had found within the tenth amendment an express declaration of limits "upon the authority of Congress to regulate the activities of the states as states by means of the commercial power,"[36] the dissenting members of the Court decried what they considered to be an unprincipled break with past decisions establishing "that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process."[37]

Edelman v. Jordan[38] is the other recent case generally considered to be at the heart of the Court's ideological shift toward state autonomy. The factual basis of the decision is quite simple. The State of Illinois, under the auspices of the Illinois Department of Public Aid, voluntarily chose to participate in a federal-state cooperative categorical assistance program commonly known as Aid to the Aged, Blind and Disabled (AABD).[39] Under applicable regulations, the federal government guaranteed matching funds and established administrative procedures to govern application, entitlement and disbursement processes. These regulations applied to states choosing to participate in the program.[40] In 1968, Illinois officials began administering the program under state regulations materially different from those promulgated by the federal government. In particular, federally imposed time limitations governing the application and disbursement process were ignored and benefit payments were curtailed or delayed. Recipients claiming entitlement under the AABD program brought an action for declaratory and injunctive relief in the federal district court. They alleged: first, that the state regulations were inconsistent with superior federal law and therefore invalid under art. VI of the U.S. Constitution and, second, that the unequal application of the regulations effectively denied them equal protection of the laws. The district court granted prospective relief against continued application of the Illinois regulations. It also required that state officials release, retroactively, AABD benefits withheld from those whose applications had not been processed in accordance with federal law.[41] The Court of Appeals for the Seventh Circuit affirmed in *Jordan v. Weaver*.[42]

The question, presented to the Supreme Court in the Fall of 1973, was whether the eleventh amendment operated as a bar to the award of retroactive benefits payable out of the state treasury.[43] The Court's decision reversed the affirmance of that portion of the district court's order granting retroactive monetary relief. Citing with approval portions of Judge McGowan's opinion in *Rothstein v. Wyman*,[44] the Court stated:

> It is not pretended that these payments are to come from the personal resources of the appellants. Appellees expressly contemplate that they will,

36 *Id.* at 842.
37 *Id.* at 857 (Brennan, J., dissenting, and citing Gibbons v. Ogden, 21 U.S. (9 Wheat.), 197 (1824)).
38 415 U.S. 651 (1973).
39 Aid to the Aged, Blind and Disabled Act, 42 U.S.C. §§ 1381-1385 (1970).
40 45 C.F.R. § 206.10 (1973).
41 Jordan v. Swank, No. 71 C 70 (D. Ill. 1972).
42 472 F.2d 985 (7th Cir. 1973).
43 415 U.S. at 658-59.
44 467 F.2d 226 (2d Cir. 1972).

> rather, involve substantial expenditures from the public funds of the state. . . . It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the State is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force. 467 F.2d at 236-237.[45]

In reaching its conclusion that retroactive payments "fall afoul of the eleventh amendment,"[46] the Court focused on the nature of the relief requested and, concluding that the prayer for "equitable restitution" was essentially a suit for "damages against the state, invoked the immunity doctrine to preclude recovery."[47] While *Edelman* strengthened the relative position of the state vis-à-vis the exercise of federal judicial authority, it did so with barely a majority vote. In this respect, Justice Brennan's dissent, which completely rejected application of "the nonconstitutional but ancient doctrine of sovereign immunity,"[48] stands in telling polarity to the opinion of the Court. Unlike Mr. Justice Rehnquist, who, writing for the majority, found in the history of the eleventh amendment a rationale for reversing the court below, Justice Brennan remained convinced that the immunity doctrine could not be applied to bar the exercise of an enumerated power specifically granted Congress by the states in the Constitution.[49]

II.

To what degree do these cases represent a major long-term shift in the Court's overall perspective of the role of state governments in our federal system? In pursuing this inquiry, two approaches immediately suggest themselves. First, to what degree has the Court extended these doctrinal holdings when given the opportunity to do so? Secondly, to what degree have the controlling policy considerations in these cases markedly influenced cases in other areas?

This article will proceed with these inquiries in the following manner: First, it will examine the consideration given to the Commerce Power-tenth amendment analysis in cases decided subsequent to *National League of Cities*. Next, since it might be expected that the tremors of any long-term enhancement of the role of state governments as a result of *National League of Cities* would be felt in doctrinally distinct yet ideologically analogous situations, it will examine whether that decision appears to have had any effect on the Court's treatment of either the Spending Power Clause or on federal-state relations in the taxation

45 415 U.S. at 665.
46 *Id.*
47 *Id.* at 668.
48 *Id.* at 687.
49 He wrote:

> I remain of the opinion that "because of its surrender [of sovereign rights at the formation of the Union] no immunity exists that can be the subject of a congressional declaration or a voluntary waiver" . . . and thus have no occasion to inquire . . . whether or not Illinois voluntarily waived the immunity by its continued participation in the program against the background of precedents which sustained judgments ordering retroactive payments.

415 U.S. at 688.

area. Then, the article will shift in perspective to the Court's post-*Edelman* consideration of eleventh amendment problems. Here, the path is somewhat better worn—at least at the beginning. Finally, from this cross-doctrinal examination of the ebb and flow of the recent cases, this article will suggest the significance of these cases in terms of a long-term prognosis for the concept of "state sovereignty" at the hands of the present Supreme Court.

A. *Subsequent Commerce Power—Tenth Amendment Confrontations*

There has been no definitive attempt by the Court in subsequent Commerce Power cases to delineate the boundaries of its analysis in *National League of Cities.* Not too long after its decision in that case, the Court was confronted with what appeared to be a particularly good opportunity to clarify its new doctrinal stance. Under the Clean Air Act Amendments of 1970,[50] the states were required to submit to the Administrator of the Environmental Protection Agency a state plan for the implementation and enforcement of national ambient air quality standards.[51] When several states failed to submit a plan acceptable to the Administrator, he promulgated his own transportation control plan for each state. In general terms, these plans required the states to develop certain regulatory procedures aimed at controlling emissions from motor vehicles. While specifics varied from state to state, the federally promulgated plans generally required the development of a motor vehicle inspection and maintenance program, various retrofit programs for older vehicles, the designation and enforcement of preferential bus and carpool lanes, and, of course, the monitoring of actual emissions from each program.[52] If the states failed to implement such programs, the Administrator could not only enforce his plan[53] but also subject the state to direct enforcement actions.[54] The affected states challenged these regulations, as *inter alia,* violative of the tenth amendment. Various courts of appeals, while striking down the plans on statutory grounds, simultaneously noted that serious constitutional questions might be raised if the statute was read to permit such federally imposed plans.[55]

50 Pub. L. 91-604, 84 Stat. 1676 (amending 42 U.S.C. § 1857 (1970)).

51 Clean Air Amendments of 1970. Pub. L. No. 91-604, § 110, 84 Stat. 1680 (amending 42 U.S.C. § 1857 (1970)).

52 Environmental Protection Agency v. Brown, 431 U.S. 99, 101 (1977).

53 42 U.S.C. § 1857 c-8(a)(2) (1970).

54 42 U.S.C. § 1857 c-8(a) (1) reads:

> Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

55 Environmental Protection Agency v. Brown, 521 F.2d 825, 827 (9th Cir. 1975); Environmental Protection Agency v. Maryland, 530 F.2d 215 (4th Cir. 1975). In Virginia ex rel. State Air Pollution Control Board v. Castle, Administrator Environmental Protection Agency v. District of Columbia, 521 F.2d 971 (DC Cir. 1975) the court took a different approach. It held that the Clean Air Act authorized the Administrator to require the state to enforce the federal regulations. It went on to conclude, however, that such authority could not constitutionally be extended to require state inspection of private vehicles.

Before the Supreme Court, the Solicitor General maintained that *National League of Cities* was not controlling since the Administrator's regulations did not "threaten the separate and independent existence of the State."[56] They did not, he argued, place substantial costs on the state or "displace a wide range of state decisions about how traditional state functions will be performed."[57] Indeed, he submitted, the regulations are "narrowly drawn to affect only one area of state activity—its transportation policy—and only that part of the activity that specifically creates the pollution problem."[58] For good measure, he added that the pollution problem was a "national emergency"[59] such as that confronted in *Fry v. United States,*[60] a holding explicitly reaffirmed in *National League of Cities.*[61]

In a five-page postargument *per curiam* opinion,[62] issued five months after oral argument,[63] the Court returned the cases to the courts of appeal for a consideration of mootness. Seizing principally on a footnote in the Solicitor General's brief that conceded the necessity of "removing from the regulations all requirements that the states submit legally adopted regulations,"[64] the Court

56 Brief for the Federal Petitioners at 18, Environmental Protection Agency v. Brown, 431 U.S. 99 (1977).

57 *Id.*

58 *Id.*

59 *Id.*

60 426 U.S. at 853. Justice Rehnquist accepted the *Fry* Court's characterization of the situation there presented as "an emergency measure to counter severe inflation that threatened the national economy." 421 U.S. at 548. He then continued:

> We think our holding today quite consistent with *Fry*. The enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time. The effect of the across-the-board freeze authorized by that Act, moreover, displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during the period of the emergency. Finally, the Economic Stabilization Act operated to reduce the pressures upon state budgets rather than increase them. These factors distinguish the statute in *Fry* from the provisions at issue here. The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactment tailored to combat a national emergency. "[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson* v. *New,* 243 U.S. 332, 348 (1917).

61 426 U.S. at 853.

62 431 U.S. 99 (1977).

63 Oral argument was held on January 12, 1977; the opinion was rendered on May 2, 1977.

64 Brief for the Federal Petitioner at 20 n.14, Environmental Protection Agency v. Brown, 431 U.S. 99 (1977). The entire note reads as follows:

> The Administrator has never asserted any power to compel the State to carry out its governmental responsibilities under an implementation plan by, for example, monitoring ambient air quality and enforcing the emission controls applicable to private stationary sources. Nor does he contend that he can direct the State to adopt laws or regulations creating transportation control plans that comply with the Act (see Pat. No. 1055, App. 27a-39a; Pat. No. 75-909, p. 17, n. 15). He thus concedes the necessity of removing from the regulations all requirements that the States submit legally adopted regulations; the regulations contain no requirement that the State adopt laws. If the State fails to adopt an adequate plan, the Administrator must promulgate a comprehensive substitute plan, specifying such matters as the types of vehicles to be inspected, the standards that must be met, and the frequency of inspection. The State must then implement the program by establishing the necessary

declined "the federal parties' invitation to pass upon the EPA regulations, when the only ones before us are admitted to be in need of certain essential modifications."[65] Justice Stevens, dissenting in a short but vigorous opinion, remarked that the "action the Court takes today is just as puzzling as the federal parties' position."[66]

It is indeed difficult, as Justice Stevens suggests, to see how the narrow admission of the federal petitioners did in fact make the case technically moot rather than simply inappropriate for Supreme Court review.[67] The plain fact is that the Court flatly declined this "particularly good opportunity to clarify its new doctrinal stance."[68] The significance of this action is a more difficult question. It would be pure conjecture to conclude from the Court's rather inexplicable behavior that its action constitutes a rejection of Justice Blackmun's view that the analytical pattern of *National League of Cities* is essentially a "balancing approach [,] and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater. . . ."[69] The only definitive conclusion that can be supported by the Court's action is that its disposition did not manifest any headlong rush to enhance the autonomy of the states.[70]

Another Commerce Power case, *City of Lafayette, Louisiana v. Louisiana Power and Light Co.*,[71] while deciding in a technical sense only a matter of statutory construction, provides more significant insight into future constitutional directions for the concept of "state sovereignty." Here, the Court was asked to determine whether the prohibitions of the federal antitrust laws[72] were applicable to state municipalities. It had been contended in this litigation that the City of Lafayette, in the sale of electricity outside its boundaries, had engaged in certain monopolistic practices which had injured competing producers of power in their

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inspection facilities, conducting the inspections, refusing to register nonconforming vehicles, and enforcing its registration laws.

65 431 U.S. at 103.

66 *Id.* at 104.

67 *Cf.* Cook v. Hudson, 429 U.S. 165 (1976) (writ dismissed where intervening decision of Supreme Court of the United States and intervening state statute made clear that question would not arise again in that state); Picirillo v. New York, 400 U.S. 548 (1970) (writ dismissed where intervening New York decision established that no controversy any longer existed between parties with respect to the question upon which certiorari had been granted); Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) (writ dismissed where intervening Iowa statute would prevent question from arising again in that state). *But see* Iowa Beef Packers, Inc. v. Thompson, 405 U.S. 228, 232 (1971) (Douglas, J., dissenting). *See generally,* Blumenstein. *The Supreme Court's Jurisdiction — Reform Proposals, Discretionary Review, and Writ of Dismissals,* 26 VAND. L. REV. 895 (1973).

68 *See* text following note 35 *supra.*

69 426 U.S. at 855.

70 In Beame v. Friends of the Earth, 434 U.S. 902 (1977), the Court denied certiorari in another case involving a transportation control plan. It would be especially inappropriate to infer any significance in terms of a long-term jurisprudential trend from this action. The court of appeals gave two alternative rationales for its holding: it first reasoned that the applicants were precluded by section 307(b)(2) of the Clean Air Act, 42 U.S.C. § 1857 h-5(B)(2) from making their constitutional attack on the plan as a defense to a civil enforcement proceeding. Second, the court of appeals held that the tenth amendment was no bar to the plan since, unlike the situations in E.P.A. v. Brown the state had promulgated its own plan. Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977). *See also* 434 U.S. at 1310 (Marshall, J., in chambers).

71 435 U.S. 398 (1978).

72 The Sherman Anti-Trust Act and the Clayton Act are codified beginning at 15 U.S.C. § 1 (1970).

business or property.[73] In a long, rather unstructured plurality opinion,[74] Justice Brennan found, in effect, that the rationale of *Parker v. Brown*[75] ought not to apply *ex proprio vigore* to antitrust claims against state municipalities. Reading *Parker v. Brown*[76] and more recent explanations of its holding in *Goldfarb v. Virginia State Bar*[77] and *Bates v. State Bar of Arizona*[78] as limiting the exemption to "official action directed by [the] State,"[79] the Justice concluded that it would be inconsistent with that limitation to extend the exempion to state municipalities.[80] "Cities," he asserted, "are not themselves sovereign; they do not receive all the federal deference of the states that create them."[81] It is only when a municipal corporation, acting as an instrumentality of the state for the convenient administration of government, acts as a state agency pursuant to state policy "to the same extent as the State itself"[82] that *Parker v. Brown*[83] is applicable.

Significantly, Justice Brennan basically grounded this characterization of municipalities on eleventh amendment precedent which held that cities were not protected by that provision from suit in federal court.[84] Since, under his formula, cities were exempted from the scope of the antitrust laws "when acting as state agencies implementing state policy to the same extent as the state itself,"[85] *National League of Cities* was not, in his view, "even tangentially implicated."[86] By contrast, the dissent of Justice Stewart,[87] while clearly considering the case a matter of statutory construction, made it clear that "if constitutional analogies are to be looked to, a decision much more directly related to the case than those under the eleventh amendment is *National League of Cities . . .*"[88] —not only because it also involved an exercise of the Commerce Power but also because it held "that states and their subdivisions must be given equal defer-

73 This action was originally brought by the City of Lafayette and other cities. They alleged that the respondent, among others, had committed certain antitrust violations. Respondent counterclaimed, alleging antitrust violations on the part of the City. The district court dismissed the counterclaim on the ground that the "state action doctrine" of Parker v. Brown, 317 U.S. 341 (1943), forbade the maintenance of a federal antitrust action against the City. *See* Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973). The court of appeals reversed, holding that Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) required a showing that the authority given the city by the legislature contemplated the type of anticompetitive action forming the basis of the complaint. 532 F.2d at 434-35.

74 Justice Brennan was joined by Justices Marshall, Powell, and Stevens. The Chief Justice joined Part I of the opinion, making that section an opinion of the Court. Justice Powell had joined the majority in *National League of Cities.*

75 317 U.S. 391 (1943). In this case, the Court held that an anticompetitive marketing program for the 1940 California raisin crop, adopted pursuant to the California Agricultural Prorate Act, did not violate the antitrust laws.

76 *Id.*

77 421 U.S. 773 (1975).

78 433 U.S. 350 (1977).

79 435 U.S. at 412.

80 *Id.*

81 *Id.*

82 *Id.* at 412.

83 *See* note 75 *supra.*

84 *See, e.g.,* Lincoln County v. Luning, 133 U.S. 529 (1890). The Court recently ruled that an interstate compact "comparable to a county or municipality" does not enjoy eleventh amendment immunity.

85 435 U.S. at 412.

86 *Id.*

87 *Id.* at 426.

88 *Id.* at 430.

ence."[89] To Justice Stewart and the three other members of the Court[90] who joined his opinion, municipalities are *only* " 'instrumentalities of the state for the convenient administration of government within their limits.' "[91] They "have only such powers as are delegated them by the state of which they are a subdivision, and when they act they exercise the state's sovereign power."[92] In the view of these Justices, therefore, the plurality's holding that municipalities did not share completely in the sovereignty of the state government would precipitate for state governments many of the difficulties which were at the heart of the Court's rationale in *National League of Cities.* Most notably, in the view of the dissenters, the plurality's emphasis on the necessity of state legislative action and the vagueness of how precise a legislative mandate will be required would have the net effect of diminishing the extent to which states would allocate power to its governmental subdivisions. States would no longer be free to structure their internal organization to permit municipalities "to deal quickly and flexibly with local problems"[93] while the state legislature devotes more time to statewide matters.[94]

What do the writings in this case contribute to the long-term prognosis of the concept of "state sovereignty" in our jurisprudence? The two principal opinions present—in doctrinal and in ideological terms—a rigid standoff. The plurality opinion, similar to the opinion Justice Brennan delivered in *Massachusetts v. United States,*[95] on the same day,[96] can easily be read as an effort to erode the doctrinal underpinnings of *National League of Cities.* Under this view, unless the municipality can show that its actions have met the still ambiguous test of being "pursuant to state policy," the tenth amendment restrictions on the extent of the Commerce Power outlined in *National League of Cities* are not even implicated. On the other hand, the dissenters, while admittedly focusing on the statutory interpretation question, show no predilection toward the moderate approach of balancing the interests of federal policy and of state governments which Justice Blackmun suggested in his concurring opinion in *National League of Cities.*[97] On the contrary, Justice Stewart emphasizes the right of the state to retain full flexibility not only in its structuring of its subdivisions but also in its choice of regulatory options.

The separate opinion of the Chief Justice,[98] whose vote was necessary to permit the Brennan plurality to prevail, is also instructive in terms of long-term doctrinal and ideological prognosis. To him, the present case was determined by the fact that the *City of Lafayette* was " 'engaging in what was clearly a busi-

89 *Id.* (citing 426 U.S. at 844 n.20).
90 Justice Stewart was joined by Justices White, Blackmun (except for Part II B), and Rehnquist.
91 435 U.S. at 429 (quoting Louisiana v. Mayor of New Orleans, 109 U.S. 285, 287 (1883)).
92 *Id.* (citing with approval Avery v. Midland County, 390 U.S. 474, 480 (1968) and Breard v. Alexandria, 341 U.S. 622, 640 (1951)).
93 435 U.S. at 435.
94 See especially section II A of Justice Stewart's opinion. 435 U.S. at 434.
95 435 U.S. 444 (1978). *See* text accompanying note 165 *infra.*
96 March 29, 1978.
97 426 U.S. at 880.
98 435 U.S. at 418.

ness activity' "[99]—a situation clearly beyond the exemption of *Parker v. Brown*[100] and, he adds, clearly beyond the scope of the prohibition on federal Commerce Power in *National League of Cities*. Significantly, then, he seems to see a governmental-proprietary distinction as one of the controlling, if unarticulated, bases of the *National League of Cities* opinion.[101] Moreover, even if it were established that the city's "governmental" action was the result of "a state policy to displace competition with regulation or monopoly public service,"[102] the Chief Justice would go a step further and require a showing that the exemption from federal law "was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary."[103] This test—borrowed from *Cantor v. Detroit Edison*[104]—seems compatible with the "balancing approach of Mr. Justice Blackmun in *National League of Cities* and certainly does not demonstrate the same preoccupation with the structural autonomy of the states and municipalities as manifested by the dissenters.

In sum, Commerce Power—tenth amendment cases subsequent to *National League of Cities* provide little indication of future doctrinal or ideological trends. From the little available evidence, there appears to be no workable majority of the Court capable of defining, with any degree of precision, the relationship between these two competing constitutional considerations. The root of the difficulty appears to be the Court's reluctance—or inability—to grapple with a definition of "integral governmental functions"[105] beyond the one offered in *National League of Cities* itself.[106] Indeed, there is significant ambiguity concerning the appropriate methodology to be employed in defining that term. The "balancing approach" of Justice Blackmun in *National League of Cities*[107] acknowledges that federal power ought not act upon the states in the same manner as it does on private individuals. It also seems to accept the proposition that it would be setting "the tenth amendment on its head . . . [to require] that state power, or at any rate a *part* of it, be defined prior to the definition of national power. . . ."[108] However, the major difficulty with this definitional approach is that it invites—indeed requires—*ad hoc* assessments with little in the way of external criteria to guide the judgment.[109] There is some evidence that the more structurally disposed members[110] of the *National League of Cities* majority would prefer a historical approach to the task of defining "integral

99 *Id.*
100 *See* note 75 *supra.*
101 435 U.S. at 423-24.
102 435 U.S. at 425 (citing the plurality opinion 435 U.S. at 413).
103 435 U.S. at 426 (quoting Cantor v. Detroit Edison Co., 428 U.S. 579, 597 (1976)).
104 428 U.S. 579 (1976).
105 426 U.S. at 851.
106 They were defined as "[t]hose activities . . . performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851 (footnote omitted).
107 426 U.S. at 856.
108 E. CORWIN, THE COMMERCE POWER v. STATES RIGHTS 125-26 (1936) (emphasis in the original).
109 426 U.S. at 851.
110 As indicated previously (*see* text accompanying notes 103, 104 *supra*), the opinion the Chief Justice in *City of Lafayette* indicates he may now favor a "balancing approach."

government functions."[111] However, unless *Flagg Brothers, Inc. et al. v. Brooks*[112] is relevant (which appears highly unlikely), the Court has yet to provide any guidance from this perspective either.

Having found little hard evidence of the Court's future attitude toward "state sovereignty" in cases involving the same doctrinal analysis as *National League of Cities*, the next logical step is to explore those areas where, while there was no possibility of a direct doctrinal impact from that case, measurable ideological "fallout" might be expected, if, in fact, we are witnessing a major shift in the Court's regard for the sovereignty of the states.

B. *Restrictions on Federal Grants to States*

In *National League of Cities,* Mr. Justice Rehnquist noted, quite pointedly, that the Court was not, in that case, confronted with a claim that the tenth amendment was an affirmative restriction on congressional use of its Spending Power.[113] The Court was, therefore, well aware of the possible ramifications of its decision into that long-controversial but judicially inactive area. Moreover, given the widespread increase in "strings attached" grants in recent years, the Court's realization that its holding had implications for that area is not surprising. Since *United States v. Butler,*[114] the tenth amendment has been considered at least a theoretical barrier to federal regulation of activity not otherwise within Congress' enumerated powers. Of course, a tremendous portion of *Butler*'s strength has been dissipated by subsequent holdings such as *Stewart Machine Co. v. Davis*[115] and *Oklahoma v. United States Civil Service Commission.*[116] It is now generally accepted that the federal government may condition a grant of federal funds to a state upon compliance with certain requirements[117]—especially when those conditions are designed to assure the proper use of those funds[118] or where the state is a willing partner in the arrangement.[119] However, if under *National League of Cities,* the federal Commerce Power may not intrude into the area of "integral governmental functions"[120] of the state, ought a similar prohibition ever govern attempts by the Congress to condition monetary grants on stipulations which operate directly upon the structure or functions of state government itself?

During its 1977 Term, the Court was presented with an opportunity to expand the rationale of *National League of Cities* to a situation where Congress had conditioned the receipt of federal funds, under the National Health Planning

111 The Court emphasized that "integral governmental functions" included those services *traditionally* provided by state governments. *See, e.g.,* 426 U.S. at 851 n.16; *id.* at 855.

112 436 U.S. 149 (1978). This case dealt with the "state action" requirement of fourteenth amendment analysis and held that a private party does not act for the state unless it performs what has traditionally been an *"exclusive* public function" (emphasis added). There is no indication that the Court contemplates making the state action concept in this area interchangeable with a definition of "integral government functions."

113 426 U.S. at 852 n.17.

114 297 U.S. 1 (1936).

115 301 U.S. 548 (1937).

116 330 U.S. 127 (1947).

117 *See, e.g.,* Vermont v. Brinegan, 379 F. Supp. 606 (D. Vt. 1974), where highway funds were withheld for noncompliance with Highway Beautification Act.

118 330 U.S. 127 (1947).

119 Stewart Machine Co. v. Davis, 301 U.S. 548 (1937).

120 426 U.S. at 851.

and Resources Development Act of 1974,[121] upon the state's establishment of a "certificate of need program."[122] Such a program would be designed to limit new institutional health delivery systems in the state to "only those services, facilities, and organizations found to be needed. . . ."[123] Under a decision of the Supreme Court of North Carolina,[124] establishment of the program would have been, in the words of that Court, "in excess of the constitutional power of the Legislature."[125] The state argued, therefore, that as a price for participating with the other states of the Union in over forty federal assistance program in the health care field, it was being compelled, by the federal government, to amend its state constitution. This "gun-at-the-head" approach to ensuring federal standards of uniformity, argued the state, violated, *inter alia*,[126] the tenth amendment. The thrust of the complaint was narrowly drawn. The state made no general challenge to the validity of federal health appropriations under the General Welfare Clause. More importantly, there was no broad-based attack on the general power of the federal government to impose terms and conditions upon its fiscal grants to the states. Rather, the state contended: first—that the conditions imposed may not be unrelated to the legitimate purposes of federal health legislation; second—that those conditions may not invade the sovereign rights of the states.[127] The weakness of the state's case on the first contention not only brought about a rather summary rejection of that submission by the district court but also affected substantially the vitality of the second. Essentially, the district court noted that the federal legislation had, as one of its basic purposes, the more efficient and economical use of health services through correction of the "maldistribution of health care facilities and manpower."[128] Given this statutory purpose, concluded the court:

> Congress in making grants for health care to the States, should be vitally concerned with the efficient use of the funds it appropriates for that purpose. It had a perfect right to see that such funds did not cause unnecessary inflation in health costs to the individual patients. It certainly had the power to attach to its grants conditions designed to accomplish that end.[129]

Then, distinguishing *National League of Cities* as a Commerce Clause case in a footnote,[130] the Court dismissed the tenth amendment argument in two sentences by simply noting that participation in the program was not mandatory.[131]

The Supreme Court affirmed the judgment summarily.[132] It is now clear,

121 National Health Planning and Resources Development Act of 1974 § 1501, 42 U.S.C. § 300 (1974).
122 42 U.S.C. § 300 m-2(a)(4)(B) (1974).
123 *Id.*
124 *In re Certificate of Need for Aston Park Hospital Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973).
125 *Id.* at 193 S.E.2d at 733.
126 Other federal constitutional claims were based on the Due Process Clause of amendment XIV and on the Guaranty Clause of article IV, section 4.
127 North Carolina v. California, 445 F. Supp. 532 (E.D.N.C. 1977).
128 *Id.* at 534 (citing [1974] U.S. CODE CONG. & AD. NEWS 7878-79.)
129 *Id.*
130 *Id.* at 536 n.10.
131 *Id.* at 536.
132 435 U.S. 962 (1978).

of course, that, whatever may be their precedential significance for lower courts,[133] such summary actions do not represent—and are not considered by the Court to be[134]—a full consideration of the issue or a full confirmation of the reasoning of the lower court. The Court's action is this case cannot, therefore, be read as anything more than its refusal of a single invitation to examine the tenth amendment implications of the conditional exercise of the Spending Power.[135] Indeed, in terms of formulating long-term constitutional doctrine, the case was not a particularly attractive invitation. The condition imposed by the federal statute was clearly related to the stated congressional objective of fostering a more economical and efficient delivery of health services. Moreover, the state could have "adopt[ed] the 'simple expedient' of not yielding"[136] to the conditions imposed. The real challenge to tenth amendment limitations on the Spending Power will probably not come until the Court considers a case where the "nexus" between the congressional purpose and the restriction is far more attenuated. There, the case could be characterized more effectively as the use of the Spending Power in one area to force surrender of tenth amendment autonomy in another.[137] Even then, however, the state will be expected to respond to the argument that it retained the option simply to decline participation in the distribution of federal funds. In this regard, a reading of *National League of Cities*—both in terms of content and "tone"—leaves the reader somewhat in doubt as to whether the present pragmatically oriented Court would rigidly accept Mr. Justice Cardozo's distinction between "coercion" and "inducement"[138] in the face of the realities of state financing and the concomitant necessity for states to recoup at least a substantial share of the federal tax contributions of its residents. On the other hand, as noted in the discussion of recent Commerce Power-tenth amendment cases, there are some faint indications that the Court will continue to consider any voluntary participation by the states as a waiver of claims to autonomy of action.[139]

C. *State Taxation*

The power to tax and the ability to remain immune from taxation by other governments have been, at least since the time of Chief Justice Marshall's opinion in *McCullough v. Maryland*,[140] key barometers for measuring the distribution of power in our federal system. Indeed, some of the later cases in this area, defining the scope of the tax immunity doctrines, played a significant role in Justice Rehnquist's analysis in *National League of Cities*.[141] Therefore, any significant

133 Hicks v. Miranda, 422 U.S. 332, 343-45 (1975). Fusari v. Steinberg, 419 U.S. 379, 388-89 n.15 (1975).
134 Edelman v. Jordan, 415 U.S. 651, 670-71. *See also* Rehnquist, *Whither the Courts*, 60 A.B.A.J. 787, 790 (1974).
135 *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 18 (Supp. 1979) (maintaining that this "unceremonious summary affirmance" "settled a question" left open in *National League of Cities*).
136 330 U.S. at 143.
137 *See* 301 U.S. at 590.
138 *Id.* at 585-90.
139 *See* Beame v. Friends of the Earth, 434 U.S. 1310 (1977) (Marshall, J., in chambers) discussed in note 70 *supra*.
140 17 U.S. (4 Wheat.) 316 (1819).
141 426 U.S. at 843-44 (see especially n.14).

ideological shift in the long-range distribution of sovereign power within the federal system would probably be recorded here. During the past few terms of Court, the Justices have decided, on plenary review, several cases which, when read together, might easily be interpreted, at least at first glance, as establishing a strong predilection on the part of the Court to give the states the widest possible berth with regard to their taxing power. Some of these cases involved the interpretation of specific constitutional limitations on the states' power to tax. Others involved the so-called intergovernmental immunity doctrine.

Two cases involving the Import-Export Clause[142] can be viewed as exhibiting a propensity, on the part of the Court, toward permitting the state the widest latitude possible in preserving its traditional residual power to tax property within its boundaries. In *Kosydar v. National Cash Register Co.*[143] the Court was confronted with an attempt by the State of Ohio to include, on its local property tax rolls, crated business machines awaiting foreign shipment in NCR's Dayton warehouse. The machines were specially adapted for foreign use and not marketable in the United States. NCR contended that the machines were immune from state taxation on the ground that they were exports subject to the protection of the Import-Export Clause.[144] Refusing to rely on the absence of any "diversion potential"[145] of the machines, Mr. Justice Stewart, writing for a unanimous Court, rejected the claim of immunity "[g]iven the absence of an entrance of the respondent's machines into the export stream."[146]

Similarly, in *Michelin Tire Corp. v. Wages*,[147] the taxing authorities of Gwinnett County, Georgia, assessed an *ad valorem* property tax against tires and tubes imported by Michelin from France and Nova Scotia. At the time of the imposition of the tax, the tires had been removed from their container and were stacked in Michelin's warehouse awaiting sale and delivery to franchised dealers. Overruling *Low v. Austin*,[148] the Court held that a nondiscriminatory *ad valorem* property tax was not within the prohibition of the Import-Export Clause.[149]

At least one significant development in the more relevant area of intergovernmental tax immunities could also be interpreted, at first glance, as indicating a propensity on the part of the present Court to favor the capacity of the states to exercise their taxing authority. In *United States v. Fresno*,[150] the Court was faced with the application of a California nondiscriminatory annual use or

142 No State shall, without the Consent of the Congress, lay any Impost or Duties on Imports or Exports, except what may be absolutely necessary for executing the inspection laws: and the net Produce of All Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.
U.S. CONST. art. I § 10.
143 417 U.S. 62 (1974).
144 *Id.* at 64.
145 *Id.* at 70.
146 *Id.* at 70-71.
147 423 U.S. 276 (1975).
148 80 U.S. (13 Wall.) 29 (1872). Relying on Brown v. Maryland 25 U.S. (12 Wheat.) 419 (1827), the Court had held that "[w]hilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition." 80 U.S. (13 Wall.) at 39.
149 423 U.S. at 302.
150 429 U.S. 452 (1977).

property tax on the "possessory interest"[151] of federal employees in housing owned and supplied to them by the federal government as part of their compensation. After rehearsing the oscillating precedents since *McCullough*,[152] Mr. Justice White, relying on the so-called "Detroit Trilogy,"[153] held that "a state may, in effect, raise revenues on the basis of property owned by the United States so long as it is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed."[154]

Close analysis of the foregoing cases reveals, however, a far more principled basis for the Court's holdings than a simple predilection in favor of broad state taxing power. While the brief *Kosydar* opinion provides little evidence of the policy considerations underlying the Court's rationale, *Michelin* is based on a detailed and explicit analysis of the purpose of the Import-Export Clause and employs, against that background, a "functional analysis" of the impact of the *ad valorem* tax.[155] As Mr. Justice Blackmun recently pointed out in *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*,[156] the most recent Import-Export Clause case, *Michelin* determined the applicability of the import-export prohibition by analyzing whether the state tax in question offended "any of the three policy considerations leading to the presence of the Clause. . . ."[157] The Court found that the tax offended none of these policies since: 1) "[i]t did not usurp the federal government's authority to regulate foreign relations since it did not 'fall on the goods because of their place of origin' ";[158] 2) it did not deprive the federal government of any revenues to which it might be otherwise entitled but simply compensated the states for municipal services rendered; 3) it would not "disturb harmony among the states because the coastal jurisdictions would receive compensation only for services and protection extended to imports."[159] A close analysis of the *Fresno* case also reveals a similar "functional" methodology. The Court there concluded that the principle of intergovernmental immunity is simply aimed at protecting the "target sovereign's"[160] ability to function free from control, in the form of obstruction or burden, of the other sovereign. The tax at issue in *Fresno* placed the legal incidence of the tax on the individual. The economic burden, if in fact passed on to the federal government, merely removed "an advantage otherwise enjoyed by the federal government in the employment market."[161] Accordingly, no "federal function"[162] was impaired by the operation of the tax. This conclusion, which holds that the Court is now applying a principled, functional analysis when defining the limitations on state taxation power rather than merely following an ideological propensity for increased state power, is to some extent

151 *Id.* at 456.
152 17 U.S. (4 Wheat.) 316 (1819).
153 City of Detroit v. Murray Corp., 355 U.S. 489 (1958); United States v. City of Detroit, 355 U.S. 466 (1958); United States v. Township of Muskegon, 355 U.S. 484 (1958).
154 429 U.S. at 462.
155 423 U.S. at 290-94.
156 435 U.S. 734 (1978).
157 *Id.* at 752.
158 *Id.* at 753 (citing 423 U.S. at 286).
159 *Id.*
160 *I.e.*, the sovereign subjected to the burden of the tax.
161 429 U.S. at 464.
162 *Id.*

validated by the Court's decision in *United States v. Mississippi Tax Commission*.[163] There, the Court struck down a state tax on liquor sold to military installations since, under the terms of the state statute, the legal incidence fell on an instrumentality of the federal government—a commissioned officers' open mess.[164] Consistent with the foregoing analysis, the "federal function" was impaired since, as a matter of state law, it was forced to bear the financial burden imposed by the state.

Massachusetts v. United States[165] presents, among the tax immunity cases, a special opportunity for a long-term prognostication of the constitutional significance of "state sovereignty." In 1970 Congress enacted the Airport and Airway Development Act of 1970[166] and the Airport and Airway Revenue Act of 1970[167] which, "together constitute a comprehensive program . . . [designed to] . . . substantially . . . expand and improve the national airport and airway system over the decade. . . ."[168] According to the scheme, "federal outlays that benefited the civil users of the airways would, to a substantial extent, be financed by taxing measures imposed on those civil users."[169] One of the revenue provisions adopted was an annual registration tax which imposes a "flat fee" tax on all civil aircraft which use the navigable airspace over the United States.[170] Since no exemption was provided for aircraft owned by state governments, the federal government proceeded to assess a tax on a Massachusetts state police helicopter which was owned by the Commonwealth and used exclusively for state police functions. After the federal government levied on a bank account of Massachusetts to collect the tax, plus interest and penalties, the state brought suit for a refund. The district court[171] and the Court of Appeals for the First Circuit[172] upheld the tax. The Supreme Court affirmed.

In terms of result, this case is, of course, quite compatible with the decisional trend already perceived in the earlier tax immunity cases. Neither sovereign will be deprived of a traditional revenue source absent a showing that the imposition of the revenue measure would in fact impair the functions of the other sovereign. On several other levels of analysis, however, the positions expressed in the opinions raise serious and interesting questions concerning the Court's future treatment of state governmental entities. The principal opinion was written by Mr.

163 421 U.S. 599 (1975). To the extent that the Commerce Clause can be considered to create "by its own force . . . an area of trade free from interference by the States" and thereby to serve as "a limitation upon the power of the States," Freeman v. Hewit, 329 U.S. 249, 252 (1946), the Court's recent decision in Complete Auto Transit v. Brady, 430 U.S. 274 (1977) also may be considered a "validation of the conclusion that the Court is employing a 'functional' approach in limiting state taxation power." There, the Court upheld a Mississippi tax "on the privilege of doing business" as applied to interstate commerce since it found it to be fairly apportioned, nondiscriminatory against interstate commerce, and fairly related to the services provided by the state. 430 U.S. at 279.

164 421 U.S. at 610.

165 435 U.S. 444 (1978). This case was decided the same day as *City of Lafayette, Louisiana v. Louisiana Power and Light Co.* *See* note 96 *supra*.

166 29 U.S.C. §§ 1711-1715, 1717 (1970).

167 Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236 (codified in scattered sections, 26, 49, U.S.C.).

168 435 U.S. at 447.

169 *Id.*

170 Airport and Airway Revenue Act of 1970 § 206, 26 U.S.C. § 4491 (Supp. II 1972).

171 The opinion of the district court is unpublished.

172 548 F.2d 33 (1st Cir. 1977).

Justice Brennan. It would have been a rather straightforward task to decide the case on the ground that the tax amounted simply to a user fee. Indeed, the Court of Appeals had decided the issue on this narrow ground.[173] The Solicitor General, arguing in support of the tax, similarly relied upon this characterization.[174] The dissenting Justices[175] indicated that, if the record were adequately developed, they would be willing to sustain the tax on that basis.[176] Justice Brennan, however, rejected this direct route and filed an opinion which is a classic example of judicial guerrilla warfare over constitutional doctrine.

First, writing for a plurality of four Justices—notably the four who joined him in his *National League of Cities* dissent[177]—the Justice launched into a full-scale but, in terms of what would have been necessary to decide the matter on a user fee rationale, gratuitous exposition of the theoretical basis of the tax immunity doctrines. From the beginning of the opinion, it is quite apparent that this circuitous route was chosen to achieve an important conceptual limitation on *National League of Cities*. The Justice began by stressing the different bases for federal immunity from state taxation and for state immunity from federal taxation.[178] While the former is clearly based on the Supremacy Clause, the latter, he noted, "was judicially implied from state's role in the constitutional scheme,"[179] in order to ensure the autonomy of the "traditional state functions"[180] of the states. Lest the latter phrase be given an expansive meaning, the Justice added that

> immunity for the protection of state sovereignty is at the expense of the sovereign power of the National Government to tax. Therefore, when the scope of the States' constitutional immunity is enlarged beyond that necessary to protect the continued ability of the States to deliver traditional governmental services, the burden of the immunity is thrown upon the National Government without any corresponding promotion of the constitutionally protected values.[181]

Relying on Chief Justice Marshall's famous dictum in *McCullough v. Maryland*,[182] he justifies this narrow scope of the states' constitutional immunity on the ground that federal tax policy is the product of the national Congress which, in turn, is composed of state constituencies—"an inherent check against the possibility of abusive taxing of the states by the National Government."[183] By footnote, he quickly asserts that, while *National League of Cities* "rejects the argument that the operation of the political process eliminates any reason for reviewing federalism-based challenges to federal regulation of the states *qua*

173 *Id.* at 34.
174 Brief of the United States at 6-7, Massachusetts v. United States, 435 U.S. 444 (1978).
175 Justice Rehnquist dissented, and he was joined by the Chief Justice.
176 435 U.S. at 472 (Rehnquist, J., dissenting).
177 Justices White, Marshall, and Stevens joined all of Justice Brennan's opinion, Justices Stewart and Powell joined parts II-C and III.
178 435 U.S. at 453-60.
179 *Id.* at 455.
180 *Id.*
181 *Id.* at 456.
182 "The power of taxing . . . may be exercised so as to destroy" 17 U.S. (4 Wheat.) at 427.
183 435 U.S. at 456 (footnotes omitted).

states . . ."[184] the existence of "political checks"[185] *is* relevant to a determination of the proper scope of a state's immunity from taxation.

This conceptual "fencing in" of the *National League of Cities* rationale might be simply viewed as the rear-guard action of the losing side in *National League of Cities*[186] if the theme were not carried over to that part of the opinion which was joined by two Justices—Potter Stewart and Lewis Powell—who had voted with the *National League of Cities* majority. After establishing that a user fee is a permissible federal exaction against a state government, Justice Brennan set out[187]—at this point with the additional concurrence of Justices Powell and Stewart—to determine whether the particular fee exacted by § 4491 of the Airport and Airway Revenue Act[188] could in fact be treated as a user fee. To aid in this determination, Justice Brennan proposed the utilization of the test set forth in *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*[189] In that case, the Court was confronted with formulating a test to determine the validity of a local tax on individual interstate travelers on the ground that it burdened interstate commerce. The Court upheld the validity of the tax, on the theory that interstate commerce must "pay its way," as long as the tax: 1) does not discriminate against interstate commerce; 2) is based on a fair approximation of use; 3) has a reasonable relationship to the cost of the benefits conferred.[190] This test, held the Brennan majority in *Massachusetts,* also sets forth valid criteria for determining the constitutional permissibility of a revenue measure imposed by the federal government on a state government. "State function" may simply be substituted "for interstate commerce in that test."[191] In short, the constitutional appropriateness of a fee imposed by the federal sovereign on the state sovereign is to be determined by examining whether the state is being treated like all *private* entities upon which the tax is imposed. No focused consideration need be given to the role of the state government within the federal system.

The practical significance of the willingness of two members of the *National League of Cities* majority to join an analysis which premises federal taxing power of state entities on a test which views state governments and private individuals as identical becomes clear upon a quick rereading of *National League of Cities.* There, Mr. Justice Rehnquist relied heavily on the immunity of the state from federal taxation to support his theory of state sovereignty under the tenth amend-

184 *Id.* at 456-57 n.13.
185 *Id.*
186 426 U.S. 833 (1976).
187 435 U.S. at 463.
188 26 U.S.C. § 4491 provides in relevant part:
(a) Imposition of tax.
. . .
A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of —
(1) $25, plus
(2) (A) in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.
189 405 U.S. 707 (1972).
190 *Id.* at 717-19.
191 435 U.S. at 466.

ment.[192] If a federal tax—even a federal user fee—can be assessed against a state without any focused inquiry into the impact of the measure on the state's position as a sovereign in the federal system, how secure are the roots of *National League of Cities?* The laconic concurring opinion of Justices Stewart and Powell[193] gives very little hint as to how much significance ought to be attached to their joining this latter part of Justice Brennan's opinion. It may be, since the record in this case apparently demonstrated no particular need for treating the state differently from other users, that these two Justices viewed the test borrowed from Commerce Power analysis as simply a convenient way to express the instant result rather than as a general decisional maxim. Such a perspective would indicate, however, a good deal more sympathy on the part of these two Justices for Justice Blackmun's "balancing approach" interpretation of *National League of Cities* than for the more "structural" approach of Justice Rehnquist.

In terms of result, recent cases dealing with state power to tax and to be immune from federal taxation do not indicate any perceptible shift in the relative power of the federal and state sovereigns in our federal system. Doctrinally—and attitudinally—most cases demonstrate an adherence to a traditional "functional" analysis. In the one case where the tremors of *National League of Cities* have been perceptively felt, the result is inconclusive. If that case is indicative of anything, it supports the impression left by the Commerce Power-tenth amendment cases after *National League of Cities.*[194] The Court has yet to find a principled analytical pattern for defining those attributes of "state sovereignty" protected by the tenth amendment. Indeed, it is not yet clear that any such definition is possible. Consequently, in its gropings, the "balancing approach"—articulated or not—becomes a comfortable doctrinal "halfway house" if not a permanent home for the Court.

D. *Eleventh Amendment Immunity After Edelman*

The cases following *Edelman* provide more guidance as to the scope of the eleventh amendment than do the progeny of *National League of Cities* with respect to the tenth. Hence, it is a good deal easier to predict both the future direction of eleventh amendment jurisprudence and to estimate its overall impact on the concept of "state sovereignty."

Two cases[195] subsequent to *Edelman—Milliken v. Bradley*[196] and *Hutto v. Finney*[197]—fleshed out the meaning of that decision and thus forecast the future strength of the eleventh amendment as a major contributor to the concept of "state sovereignty." In *Milliken,* the defendant officials challenged an order that required them to pay the costs of certain remedial education programs ordered

192 426 U.S. at 839.
193 435 U.S. at 470.
194 *See* text accompanying notes 105-12 *supra.*
195 A most important third case — Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) is discussed *infra. See* text accompanying notes 234-44 *infra.*
196 433 U.S. 267 (1977). This case also dealt with the relationship of the tenth and fourteenth amendment and, in that context, is discussed *infra* with Fitzpatrick v. Bitzer. *See* text accompanying note 248 *infra.*
197 437 U.S. 678 (1978).

by the district court as part of a school desegregation plan.[198] It claimed that payment was "in practical effect, undistinguishable from an award of money damages against the state . . ."[199] and therefore invalid under *Edelman*. In rejecting this contention, the Supreme Court distinguished *Edelman* as dealing with "accrued monetary liability."[200] It upheld the relief ordered since it fitted "squarely within the prospective compliance exception reaffirmed by *Edelman*"[201]—an exception rooted in the rule of *Ex parte Young*[202] that federal courts may "enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."[203] The relief in *Milliken*, explained the Court, did not purport to grant the victims of past segregative practices immediate recompense for past injury by permitting "a raid on the state treasury for accrued monetary liability."[204] Rather, "the antecedent violation"[205] will continue to affect the victims "until such future time as the remedial programs can help dissipate the continuing effects of past misconduct."[206] The mere fact that the relief might be termed "compensatory,"[207] since it is grounded on a past violation, does not raise the eleventh amendment bar. Since state officials were clearly under a continuing duty to conduct a school system free of the taint of past segregative acts, the Court could require that they expend state funds to fulfill that obligation.

This restrictive interpretation of *Edelman*'s scope was also clearly manifested in *Hutto v. Finney*.[208] After protracted litigation over conditions in the Arkansas prison system and noncompliance with a series or remedial orders issued to the Arkansas Department of Corrections, the federal district court awarded opposition counsel "a fee of $20,000 to be paid out of the Department of Corrections Funds."[209] On appeal, the Court of Appeals for the Eighth Circuit affirmed and assessed an additional fee of $2500 in accordance with the Civil Rights Attorneys' Fees Awards Act of 1976. Reviewing the validity of both awards, the Supreme Court affirmed the trial courts award and held that the eleventh amendment does not prevent an award of attorneys' fees to be paid out of state funds where the award is remedial in nature and fashioned to compensate the party who won the injunction for the effects of his opponents' noncompliance.[210] "The line between retroactive and prospective relief cannot be

198 402 F. Supp. 1096 (E.D. Mich. 1975). Basically, this plan involved remedial reading programs, an in-service teacher training program, a testing program and counselling and career guidance which the district court found necessary "to make desegregation work."
199 433 U.S. at 289.
200 *Id.* at 289 (quoting 415 U.S. at 633-44).
201 *Id.*
202 209 U.S. 123 (1968). The Court recently reaffirmed the holding of *Young* in Ray v. Atlantic Richfield, 435 U.S. 151, 156 n.6 (1978).
203 433 U.S. at 289 (*citing* 415 U.S. 667).
204 433 U.S. at 290 n.22.
205 433 U.S. at 290.
206 *Id.*
207 *Id.*
208 437 U.S. 678 (1978).
209 *Id.* at 685.
210 *Id.* at 687. The Court also validated attorney's fees awarded under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. 1988 (1976). Citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court noted that "Congress has plenary power to set aside the State's immunity from retroactive relief in order to enforce the Fourteenth Amendment." 437 U.S. at 693.

so rigid that it defeats the effective enforcement of prospective relief."[211] Furthermore, noted the Court, the fees awarded by the district court were not merely compensatory. Since their assessment was analogous to a fine imposed for civil contempt, they also served to vindicate the Court's authority over a recalcitrant litigant and to assure future compliance with remedial orders previously issued. In this respect, *Hutto* made clear that the bar of immunity set forth in *Edelman* does not prevent the assessment of costs ancillary to the effective enforcement of a federal court order.

The nonapplicability of the eleventh amendment to suits which involve, as a necessary by-product, "fiscal consequences to state treasuries,"[212] was again addressed by several members of the Court in a most unusual context. In the final days of October Term 1977, the Court denied, in a one-line order, a motion of the State of California for leave to file a bill of complaint in an original action[213] against the State of Texas.[214] The alleged dispute between the two states centered on their conflicting claims as the domicile of Howard Hughes, the recluse millionaire, at the time of his death. In its complaint, California alleged that, like Texas, it imposed an inheritance tax on the real and tangible personal property located within its borders and upon the intangible personality, wherever situated, of a person domiciled within the state at the time of his death.[215] Both states, as a matter of their respective internal laws, recognized that a person may have only one domicile at a given time. However, according to the complaint, neither state would submit to or be bound by proceedings in the other's courts[216] and, if both state courts find that Hughes was domiciled within their jurisdictions, the estate's total liability for federal and state taxes will exceed its net value.[217] The complaint then went on to allege that "because there is no other means by which the conflicting tax claims of Texas and California can be resolved, the Supreme Court is the only forum which can determine the question of decedent's domicile in a manner that will bind the interested parties and assure that the state of domicile . . . will be able to collect the tax."[218] Such an allegation, necessary to assure that the Court would in fact exercise its jurisdiction,[219] was based not only on the nonavailability of a state forum but also on the nonavailability of an alternate federal forum. In making such an allegation, California was relying on what was, for all practical purposes, direct precedent.

In *Texas v. Florida*,[220] the Court had sustained a complaint which was identical in all material respects. In that case, the Court had characterized the

211 437 U.S. at 690.
212 415 U.S. at 633.
213 U.S. Constitution, article III, reads in pertinent part: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction."
214 437 U.S. 601 (1978).
215 Original Bill of Complaint at 18.
216 *Id.* at 25.
217 *Id.* at 24-25.
218 *Id.* at 25.
219 *See* Arizona v. New Mexico, 425 U.S. 794 (1976), Washington v. G. M. Corp., 406 U.S. 109 (1972); Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Ohio v. Wyandotte Chemicals Co., 401 U.S. 493 (1971); Massachusetts v. Missouri, 308 U.S. 1, 19-20 (1939). *But see* 425 U.S. at 798 (Stevens, J., concurring).
220 306 U.S. 398 (1939).

action before it as one in the nature of an interpleader.[221] There was little discussion as to whether such an interpleader action could be brought in a lower federal court since, a little over a year before, the Court had squarely held in *Worcester County Trust Co. v. Riley,*[222] that an action in interpleader seeking resolution of conflicting adjudications of domicile was barred by the eleventh amendment. In reaching that result, the Court, through Chief Justice Stone, concluded that, since the suit was not aimed at restraining a state official from unconstitutional action,[223] but simply at resolving of a potential conflict in the state law decisions of two state courts, "which the Constitution does not forestall,"[224] it was barred by the eleventh amendment.

In the disposition of *California v. Texas,* four justices[225] took time to write or join opinions concurring in the Court's refusal, despite the precedent of *Texas v. Florida,*[226] to exercise jurisdiction in this case. For three of the four[227]—Justices Stewart, Powell and Stevens—the denial of jurisdiction could have been based on the ground that *Texas v. Florida* was wrongly decided since the alleged dispute did not, in fact, involve a ripe controversy between two states. As an alternative ground, however, each stressed, with varying degrees of forcefulness, his belief that *Edelman* had so limited the scope of the eleventh amendment that it could no longer be considered a bar against the estate's proceeding against the two states by way of interpleader in the federal district court. Indeed, Mr. Justice Powell wrote separately "simply to emphasize his conclusion that, in light of *Edelman v. Jordan . . . Worcester County Trust Co.* . . . no longer can be regarded as a bar against the use of interpleader by estates threatened with double taxation. . . ."[228] For him, *Edelman* had "made it clear that the eleventh amendment bars only suits 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury' . . . and not actions which may have 'fiscal consequences to state treasuries . . . [that are] the necessary result of compliance with decrees which of their very terms [are] prospective in nature' . . . at least in a case such as this, where the very controversy is a result of our federal system."[229]

In terms of its potential for long-range enhancement of the concept of "state sovereignty," the holding of *Edelman* does indeed appear to be a "paper tiger." The Court has, in the foregoing cases and others more tangentially related to our

221 *Id.* at 405-12.
222 302 U.S. 292 (1937).
223 *See* Ex parte Young, 209 U.S. 123 (1908).
224 302 U.S. at 298.
225 Justices Brennan, Stewart, Powell, and Stevens.
226 306 U.S. 398 (1939).
227 For Justice Brennan, the availability of interpleader in the district court after *Edelman* was apparently the sole ground for his joining the Court's judgment.
228 437 U.S. at 615 (Powell, J., concurring).
This interpretation of the eleventh amendment is consistent with the doubts concerning *Worcester Trust* expressed by Professor Zechariah Chaffee, Jr., in his seminal article on the federal interpleader statute: "It is our federal system which creates the possibility of double taxation. Somewhere within that federal system we should be able to find remedies for the frictions which that system creates. . . . The Interpleader Act of 1936 provided machinery which could have given a remedy for interstate disputes over domicile. Hence, it is disappointing that the Supreme Court felt unable to overcome the obstacles to its use." Chaffee, *Federal Interpleader Since the Act of 1936,* 49 YALE L. J. 377, 388 (1940).
229 437 U.S. at 616 (quoting 415 U.S. at 633, 667-68) (Powell, J., concurring).

focus on the place of state government in the federal system, consistently retained it within to what the Chief Justice referred to in *Milliken v. Bradley*[230] as "traditional eleventh amendment principles. . . ."[231] If the Court ever intended to use *Edelman* as a vehicle for a drastic ideological enhancement of the place of state governments in our federal system, it has clearly missed its chance.

E. *Section 5 of Amendment XIV—Meeting Place of Amendments X and XI*

Although the case law needs little particularized elaboration at this point,[232] the Court's recent treatment of the enforcement provisions of section 5[233] of the fourteenth amendment must be considered the most significant tile in the cross-doctrinal mosaic of "state sovereignty." Affecting both the tenth and eleventh amendments, these cases certainly confirm the absence of any massive ideological shift by the Court toward the enhancement of state government in our constitutional distribution of power.

Certainly, the most drastic limitation on the potential scope of *Edelman* occurred in *Fitzpatrick v. Bitzer*[234] which decided the relationship between the eleventh amendment and the enforcement provisions of the fourteenth amendment.[235] The Court's conclusion, "that the eleventh amendment and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the fourteenth amendment,"[236] drove a wedge

230 433 U.S. 267 (1977).

231 *Id.* at 289. Adherence to "traditional eleventh amendment principles" . . . caused the Court to hold, in Nevada v. Hall, 74 U.S.L.W. 4261 (1979), that "the amendment did not bar suit against a state by a citizen of another state in the courts of his state." Justice Rehnquist claimed that such a rule "[m]akes nonsense of the effort embodied in the eleventh amendment to preserve the doctrine of sovereign immunity." Similarly, in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 47 U.S.L.W. 4256 (1979), the Court, again following traditional eleventh amendment principles, refused to apply the amendment to an interstate compact "comparable to a county or municipality." *Id.* at 4259.

232 Commentary in this area has been prolific. *See e.g., Supreme Court Report,* 62 A.B.A. J. 1483, 1486 (1976); *The Second Circuit Review,* 1974-75 Term, 42 BROOKLYN L. REV. 822 (1976); Note, *Constitutional Law — Availability of Monetary Damage Awards Against the States,* 51 TUL. L. REV. 736 (1977).

233 Amendment XIV, § 5 reads as follows: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

234 427 U.S. 445 (1976). This case began as a class action under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e (1970 ed. and Supp. IV) alleging *inter alia,* that certain provisions of the State's statutory retirement benefit plan discriminated against males because of their sex. The district court found for the plaintiffs and entered prospective injunctive relief against the defendant state officials. Fitzpatrick v. Bitzer, 390 F. Supp. 278, 285-88 (D. Conn. 1974). Relying on *Edelman,* it denied retroactive relief and "reasonable attorney's fees as part of the costs" despite the existence of statutory authority for both in Title VII. *See* Civil Rights Act of 1964, § 706(g) as amended, 42 U.S.C. § 2000e-5(g) (1970) ed. Supp. IV). *See also* the Civil Rights Act of 1964 § 706(k), 42 U.S.C. § 2000e-5(k) (1970 ed. Supp. 10). The earlier provision is set out in Fitzpatrick v. Bitzer, 427 U.S. at 450 n.5. On appeal, the court of appeals affirmed the district court's grant of prospective relief and also agreed that a back pay award was not a "constitutionally permissible method of enforcing fourteenth amendment rights." 519 F.2d at 569. It reversed the district court on the attorney's fees issue, however, since it felt such an award would only have an "ancillary effect" on the state treasury. *Id.* at 571. *See* 415 U.S. at 667-68. Both parties petitioned the Supreme Court which granted both petitions, 423 U.S. 1031 (1975), and held that both retroactive payments and attorneys' fees could be awarded pursuant to the statutory authority granted in Title VII.

235 *See* notes 3 and 233 *supra.*

236 427 U.S. at 456.

into the immunity barrier erected by *Edelman*. It affirmed the ability of Congress, when acting pursuant to that authority, to provide for private suits against states or state officials which are "constitutionally impermissible in other contexts."[237]

The practical significance of *Fitzpatrick* was significantly expanded by the Court's decision in *Monell v. Department of Social Services*.[238] In *Fitzpatrick*, the Court had assumed that its decision made neither states nor municipalities subject to suit under 42 USC 1983[239] since, in *Monroe v. Pape*,[240] the Court had previously concluded, on the basis of the legislative history of § 1983, that municipalities were not within the ambit of the statute. "[T]hat being the case," concluded the *Fitzpatrick* Court, "it could not have been intended to include states as parties defendant."[241] *Monell*, however, overruled[242] *Monroe v. Pape*[243] and, since *Fitzpatrick's* assumption of state immunity under § 1983 rested squarely on *Monroe*,[244] the question was posed as to whether the demise of municipal immunity under § 1983 portends liability for states as well. To Justice Brennan, concurring in *Hutto*,[245] an affirmative reply was to be soon forthcoming.[246]

This question of whether § 1983 abrogates the states' eleventh amendment immunity was forcefully answered by the Court's recent opinion in *Quern v. Jordan*.[247] Actually, the main issue before the Court in that case was whether a lower federal court could, consistent with the eleventh amendment, order state officials to apprise welfare recipients of their right to a determination, by the state, of entitlement to certain benefits already found to have been illegally withheld.[248] Before curtly deciding that issue in the affirmative the Court, in a single paragraph, held simply that "this relief falls on the *Ex parte Young* side of the eleventh amendment line rather than on the *Edelman* side"[249] and "involves little, if any, unbroken ground."[250] The Court made it clear "that neither the reasoning of *Monell* . . ." nor that of the "eleventh amendment cases subsequent to *Edelman* . . . justifies a conclusion different from that which [was] reached in *Edelman*."[251] Accordingly, it is now established that *Monell* does not

237 *Id.* at 456 n.11. The Court noted that there was no claim that the substantive provision of Title VII did not constitute a proper exercise of authority under § 5 of the fourteenth amendment.

238 436 U.S. 658 (1978).

239 42 U.S.C. § 1983 (1970) reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

240 365 U.S. 167 (1961).

241 427 U.S. at 452.

242 436 U.S. at 701.

243 365 U.S. 167 (1961).

244 *Id.*

245 437 U.S. at 700.

246 437 U.S. at 703.

247 47 U.S.L.W. 4241 (1979).

248 This issue was decided in the litigation culminating in *Edelman v. Jordan*, 415 U.S. 651 (1973).

249 47 U.S.L.W. at 4245.

250 *Id.* at 4241.

251 *Id.* at 4243.

presage the demise of state immunity under § 1983 and, more significantly, stands as a "reaffirmance of *Edelman*."[252]

The vitality of § 5 of amendment fourteen as a brake on the concept of "state sovereignty" has also been manifested in tenth amendment analysis. In *Milliken v. Bradley*,[253] the defendants argued that the relief ordered by the District Court violated "the tenth amendment" and "general principles of federalism."[254] The Court's answer was short.

> The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. . . . Nor are principles of federalism abrogated by the decree. The District Court has neither attempted to restructure local government entities nor to mandate a particular method or structure of state or local financing. . . . The District Court has, rather, properly enforced the guarantees of the Fourteenth Amendment consistent with our prior holdings, and in a manner that does not jeopardize the integrity of the structure or functions of state and local government.[255]

The tenth amendment is, therefore, no more a barrier than the eleventh to a cause of action based on the enforcement provision of the fourteenth amendment. Just as significantly, the tremors of *National League of Cities* made no impact on the power of a federal court to fashion a remedial decree in such a case. Although the Court did not specify the "prior holdings" to which it alluded, the reference would appear to be to such cases as *Swann v. Charlotte-Mecklenburg Board of Education*,[256] *Pasadena City Board of Education v. Spangler*[257] and *Milliken v. Bradley I*.[258] In short, the scope of the remedy is determined by the nature and extent of the constitutional violation. It must be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[259] However, in so doing, the federal court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[260] Within these broad guidelines, the federal courts remain free to frame the necessary relief. There have been[261] and, no doubt, will be occasions when the particular application of these maxims will raise significant questions as to whether the ideological impact of *National League of Cities* is indeed being felt in the shaping of remedies for violations of rights guaranteed by the fourteenth amendment through its enforcement provisions. There is, indeed, ample room for a given Justice to inform each of these standards with his own ideological inclination. In terms of doctrinal standards, however, the controlling principles antedate the "conventional wisdom's" state sovereignty revolution.[262]

252 *Id.* at 4244.
253 433 U.S. 267 (1977).
254 *Id.* at 291.
255 *Id.*
256 402 U.S. 1 (1971).
257 427 U.S. 425 (1976).
258 418 U.S. 717 (1974).
259 402 U.S. at 16.
260 433 U.S. at 281.
261 *See, e.g.*, Milliken v. Bradley, 418 U.S. at 781 (Marshall, J., dissenting).
262 *See, e.g.*, Brown v. Board of Education II, 349 U.S. 294, 299 (1955).

Conclusion

An effort to discern, in a cross-doctrinal context, the direction of major ideological vectors in constitutional development is not a precise science. Indeed, at times, the line between speculation and prediction is extraordinarily delicate. In one sense, the problem is especially prevalent when, as here, many of the Court's utterances have been laconic or highly tentative. From another perspective, however, the lack of aggressive doctrinal development on the part of the Court provides the most significant clue to its current perspective and direction.

Today's Supreme Court is more consciously aware of federalism and more perceptibly concerned with preserving the identity of the state government as a separate, functional entity. It has not, however, gone beyond the tentative gropings of *National League of Cities* in defining precisely the attributes of that separate identity. The text of the Constitution provides marginal assistance in such a task. The tenth amendment[263] essentially defines the attributes of state government in the negative. Consequently, any attempt to frame a description of the characteristics of "state sovereignty" in the abstract necessarily risks the premature limitation of the scope of enumerated federal powers—a decidedly unhappy prospect for a Court which, over the past four decades, has seen the necessity, time and time again, to expand rather than contract its definition of various federal powers in order to meet hitherto unforeseen situations such as an integrated national economy or ecological and environmental concerns. It was perhaps this quandary which caused Justice Blackmun to temper his joining of the majority in *National League of Cities* with the assertion that its holding was based on a "balancing test"[264] which would permit the Court always to assess—and perhaps to define—the importance of the federal interest before defining the limits of state "immunity" from that power. The attractiveness of this "balancing approach" as an alternative to the rigid definition of the attributes of state autonomy has found, apparently, a favorable, although perhaps unconscious, reception in the recent analyses of other members of the *National Leagus of Cities* majority. The position of the Chief Justice in *City of Lafayette*[265]—especially when compared with that of the dissenters[266]—certainly displays signs of a "balancing approach" in defining the limits of state autonomy when faced with an important exercise of the Federal Commerce Power. Similarly, the acceptance of the *Evansville* test[267] by Justices Powell and Stewart in *Massachusetts v. United States*[268] may also evidence a tendency toward adherence of the Blackmun "balancing" approach.

"Balancing approaches" can indeed be convenient "holding patterns" while a Court engages in institutional reflection over its initial foray into a new doctrinal area before striking out definitively on that new heading. At some point, however, the comfort of such a "holding pattern" can cause the Court to adopt it, at least implicitly, as its permanent position. The possibility of that develop-

263 *See* note 1 *supra.*
264 426 U.S. at 856.
265 435 U.S. at 418.
266 Justices Stewart, White, Rehnquist, and Blackmun.
267 *See* text accompanying note 190 *supra.*
268 435 U.S. 444 (1978).

ment in today's ideologically divided but intensely pragmatic Court is certainly significant. Indeed, this propensity toward a pragmatic approach is already apparent in the Court's treatment of those aspects of state sovereignty rooted in eleventh amendment analysis. The Court's treatment of the trial court's attorneys' fees award in *Hutto* and the costs of the remedial programs in *Milliken,* in addition to indicating a desire to preserve necessary tools for the federal courts, also exhibit an intensely pragmatic approach toward defining the proper limits of state autonomy. Certainly, the emerging trend toward resolution of the problem of conflicting determinations of domicile by federal interpleader also manifests a predilection to resolve disputes inherent in the federal nature of our constitutional plan with more of an eye toward pragmatic resolution than doctrinal purity.

The one definitive decision which the Court has made with regard to the future of state sovereignty is also its most significant. It is now clear that, however important the Court may view the theoretical autonomy of state governments, it does not intend to promote that value at the expense of the federal government's capacity to vindicate individual civil liberties protected by the Federal Constitution. The vitality of the enforcement provisions of the fourteenth amendment, when weighed directly against the concerns of state autonomy, have been consciously reaffirmed by the Court.

The passage of time—and the concomitant accumulation of case law—will, of course, permit those who write on the tenth, fifteenth, or twentieth anniversaries of *Edelman* and *National League of Cities* to assess, with far more accuracy, the overall impact of these decisions on American federalism. At this point, however, the Court seems content to have simply revitalized the concept of state sovereignty as an important but not controlling element in the complex calculus of constitutional adjudication.